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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1995

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER, Plaintiff-Appellants,	) Petition for Writ of) Certiorari to the) Illinois Supreme) Court, No. 976442
vs.	)
KARL NAGEL and STEVEN W. BARRICKdoing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE ` APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC. an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality, DONALD HANNA , and DON CARTER Defendant-Appellees	) From the Appellate) Court of the State) of Illinois, Fourth) District,) No 4-92-0949) From the Circuit) Court of the Sixth) Judicial Circuit,) Champaign) County, Illinois) No. 92-L-645) Hon. J. G.) Townsend, Judge) Presiding

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a landlord and a municipality act under color of State law, depriving tenant guests of due process, association and movement rights, where police recommend to landlord names of persons they think should be forbidden from the premises, fill out and hand out landlord "no-trespass" notice forms and where landlord and police agree that if police "...know there's a trouble-maker anywhere in the community, why don't we just put them on the (no-trespass) list, too?", providing they were not one of landlord's residents.

Whether the Illinois Supreme Court's holding that a landlord's lease or rule authorizing premises barment invalidates tenant invitations as a matter of law to negate statutory, invitee exemption to criminal trespass arrest of guests violates their due process, association and movement rights.

Whether a landlord acts under color of State law, where he both has and exercises private contractual authority to alter state criminal trespass law in violation of due process and whether a municipality so acts, where its police jointly participate in this design that is enforced in the criminal courts.

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The decision and dissent of the Illinois Supreme Court appear as Williams v. Nagel , 162 Ill. 2d 542, 643 N.E.2d 816, 205 Ill. Dec. 525 (1994). The opinion of the Appellate Court of Illinois, Fourth District, appears at 251 Ill.App.3d 176, 620 N.E.2d 1376, 190 Ill. Dec. 115 (4th Dist., 1993).

JURISDICTIONAL GROUNDS

The opinion of the Illinois Supreme Court was filed October 27, 1994, appendix p. 3. Petition for Rehearing was denied December 5, 1994, appendix p. 34. On Petitioners' motion, the Illinois Supreme Court stayed the mandate December 13, 1994 during the filing period for this Petition, to be further stayed pending resolution on affidavit in that Court of filing, appendix p. 33.

Jurisdiction on a writ of certiorari is conferred on this Court pursuant to 28 U.S.C. § 1257(a). 28 U.S.C. § 2403(b) may be applicable: the constitutionality of a State statute is drawn into question with the State not being a party.

CONSTITUTIONAL PROVISIONS AND STATUTES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances." Amendment I, Constitution of the United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service or in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Amendment V, Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1, Amendment XIV, Constitution of the United States.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

"Section 21-3. Criminal trespass to real property. (a) Whoever enters upon the land or a building, other than a residence, or any part thereof of another, after receiving, prior to such entry, notice from the owner or occupant that such entry is forbidden, or remains upon the land or in a building, other than a residence, of another after receiving notice from the owner or occupant to depart, commits a Class C misdemeanor.

.....

(c) This Section does not apply to any person, whether a migrant worker or otherwise, living on the land with permission of the owner or of his agent having apparent authority to hire workers on such land and assign them living quarters or a place of accommodations for living thereon, nor

to anyone living on such land at the request of, or by occupancy, leasing or other agreement or arrangement with the owner or his agent, nor to anyone invited by such migrant worker or other person so living on such land to visit him at the place he is so living upon the land." 720 ILCS §§ 5/21-3(a) and (c), ("Illinois Compiled Statutes", formerly Ch. 38, Illinois Revised Statutes).

STATEMENT OF THE CASE

Suit by tenant guests against landlord owners of Parkside and Mansard Square Apartments and the City of Champaign was filed May 15, 1992, Trial Court Record ("R") 1-23. A First Amended Complaint was filed July 24, 1992, (basic counts, appendix pp. 43-53), based, inter alia, on violations of association, movement and due process rights per 42 U.S.C. § 1983. Plaintiffs sought to enjoin trespass arrest and landlord barment from the premises when they had tenant invitations (class action, not certified, and damages also plead). Id. Defendants, not responding, moved for summary judgment, R.134, 153, and as to federal questions, the court, ruling on October 9, 1992, saw "absolutely nothing in this to indicate that the private (landlords were) engaged in any sort of state action", absolved the City, V.2 Tr ("Volume 2, Transcript") 43, 44, appendix pp. 1-2, and per written order granting summary judgment on October 30, 1992, denied all other motions as moot, appendix p. 36. Plaintiffs appealed, R. 256, the Appellate Court and Illinois Supreme Court affirming, also rejecting statutory claim based on criminal trespass exemption excusing them from trespass arrest because they were tenant invitees, 720 ILCS § 21-3(c).

Lorraine Cowart and Rosa Ash, tenants of Parkside and Mansard Square (170 units in 13 privately owned, Federally subsidized buildings, R. 45, 46, V.1 Tr. 21, 22), invited Plaintiff Lawrence A. Williams to visit them and his children who reside with them, R. 25, 94, V.1 Tr. 47 (a child with Lorraine Cowart, V.1 Tr.57, three children with grandparent Rosa Ash, V.1 Tr. 47). Tenant Sharon Ann Clark, daughter of Plaintiff Mansion Clark, invited him to visit her and his three grandchildren. R. 8, 28. Plaintiff Donald Merriweather also had invitations to visit tenant relatives and close friends. R. 105, 106, 237. Plaintiffs are barred from premises by landlord on pain of trespass arrest, R. 94-95, 103, 106, 235-237, have been arrested and prosecuted, R. 95, 103, V.2 Tr. 31, and had no hearing prior to barment. R. 94-95, 103, 106, 235-237. Assistant Manager Nicholson said per letter: "Lawrence Williams was added to

our 'No Trespass List' as of July 18, 1991. Due to insufficient evidence, Mr. Williams will be taken off the 'No Trespass List' as of August 20, 1991. I apologize for any inconvenience this may have caused and the Management of Parkside/Mansard Square Apartments will do everything to omit this type of problem in the future." R. 119. On September 4, 1991, Williams was given a barring notice form, R.118, V.I Tr.32, advising, as do all these forms herein but for blank spaces, R. 118, 120, 123, 128 (handwriting italicized):

"OFFICIAL NOTICE

This letter serves as a written notice for *Lawrence Williams*,
(name)
barring you from the Parkside and Mansard Square Apartments, effective immediately.
You are not to be on the premises of Parkside and Mansard Square, which includes, but not limited to, common areas and parking lots, at any time.
This is the only notice you will receive. If you are seen on Parkside and Mansard Square property as of *9/4/91* you will be arrested for trespassing.

9-4-91 ____
DATE **TIME**
SERVED BY:*Elizabeth Nichoson*

COPY TO: Management:_____
(date)
CPD: _____
(date)
Security _____
(date)

RACE:*black*
DOB:_____
month/day/year
SEX:*male*
HEIGHT:*5'*
WEIGHT:*10"*
BRIEF DESCRIPTION

Pat Jeffers
3

recommendation from the Champaign Police department (Based on Police Reports)" R118.

65 year old Rosa Lee Ash, a 20 year tenant of Parkside and Mansard Square, has had her son-in-law,

Plaintiff Williams in her home during that time, invited because of his three kids there, her grandchildren. V.1 Tr. 46-47. He helped her in the past with those kids and had always been there for them when she needed him. Id. She recalled a tenants meeting last September (1991), V.1 Tr. 50, and a conversation with Elizabeth Nicholson: "Yeah, I told her why, you know, I didn't think he should be barred, you know, from the house, because he always would help out with the kids. And the big boy, he's--he was pretty large, Larry was, and so I had to have someone to help me out with him going to school, and different places, and he would do that, helps me a lot with him." V.1 Tr. 51.

Tenant Lorraine Cowart, 46, a sixteen year resident, has known Plaintiff Williams during that time. V. 1 Tr. 56-57. He often visited prior to his being barred ("All the time"), had a pattern of visiting her and their thirteen year old daughter, has a present invitation and "(h)e's always had an invitation." V. 1 Tr. 58. Both she and their daughter would like to see him at her apartment. V.1 Tr. 59. The landlord knew Ms. Cowart desired his visit. V. 1 R. 34.

Plaintiff Mansion W. Clark, not served the notice form dated June 10, 1989 barring him from the premises where daughter Sharon Clark and his three grandchildren live, did not commit the handwritten acts in it and lived in his daughter's apartment from January to March of 1991, when he cared for his grandchildren with knowledge and apparent consent of the landlord (he paid rent) who did not have him arrested; he did not see the form until discovery in a later criminal trespass case. R. 28-29, 103, 123, 235, V. 2 Tr. 25, 36-38.

Champaign Police officers Ron Durbin and John Schweihart, Jr., acting for all defendants, decided to bar the Plaintiff Donald F. Merriweather from Parkside and Mansard Square, serving him a form notice with the blanks and their names filled in on July 29, 1991, telling him "his kind" was not wanted on the premises. R. 106, 128. This form provided the basis for Plaintiff Merriweather's subsequent trespass arrest, prosecution and conviction. R. 240, V.2 Tr. 31.

These notice forms are "required by 720 ILCS 5/21-3(a) for prosecution for criminal trespass", page 3, Brief and Argument of the Appellee (landlords), Illinois-Supreme Court, and "(t)he service of a barred notice is a precondition for trespass by providing notice that entry is forbidden", Williams v. Nagel, 162 Ill. 2d 542, 553, 643 N.E.2d 816, 205 Ill. Dec. 525 (1994), appendix p. 10.

Mark Hamilton, per affidavit filed October 1, 1992, is the Manager of Yale Enforcement Services , Inc. which provided security for landlord from November of 1990 to February of 1992, R. 196, said there was "a policy change of Parkside and Mansard Square that actually commenced around July of 1991 of authorizing the Champaign Police Department to place persons on a list maintained by Parkside and Mansard Square Apartments barring individuals from the premises", R. 197, that his company got a policy directive in September, 1991 from the landlord that it did not have to serve persons who were barred a "bar sheet", once one is informed that he is barred, it's effective at once and one can be barred by security, police and landlord employees, R. 196, 200; that he recalled after review of a taped meeting, infra, that "the Champaign Police Department had been previously provided with a stack of blank forms from Parkside and Mansard Square Apartments for their preparation and use in barring individuals from the premises with the police filling them out and providing them to management, sometimes actually serving them on numerous occasions", R. 197-198; that "commencing in July of 1991, with the advent of increased foot patrols by the Champaign Police Department, the barred list of individuals not allowed on the premises of Parkside and Mansard Square Apartments increased from one page to three or four pages." Id (A two page, three column version dated April 29, 1992 containing 261 names is attached to the First Amended Complaint, R. 126-127). In a later affidavit filed October 7, 1992, R. 132, he said that "(s)ecurity for Parkside Mansard & Square (sic), employees of Parkside & Mansard Square and police officers had the authority to and did serve people with barred notices during the time Yale Enforcement Services, Inc. provided security

services for Parkside & Mansard Square Apartments, (t)hat to the best of my knowledge, no one was able to place an individual on the no-trespass list of Parkside & Mansard Apartments except the employees of Parkside & Mansard Square, (that) (i)f an individual was served a barred notice but not placed on the no-trespass list, we at security would not call the police department to arrest the individual for trespass if they were at Parkside & Mansard Square Apartments, (that) (t)here is a difference between barring an individual, (serving a barred notice) and placing an individual on the no-trespass list." Id.

Vice President of Property Management of Nagel Group, Inc., Patricia Jeffers said per affidavit filed October 7, 1992 that "(i)t is possible and has actually happened that police officers and security officers have actually served barred notices to individuals at Parkside/Mansard Square; (a)fter an individual is served with a notice by a police officer or security officer, Parkside & Mansard Square procedure requires notification be given to management of Parkside & Mansard Square Apartments; (after notification), management makes a determination as to whether or not the individual barred by either security or the police is placed on the no-trespass list,...has complete and total discretion as to whether or not to place these individuals on the actual no-trespass list (and) has only enforced trespassing complaints against those individuals on the no-trespass list; (i)f for some reason, an individual is served with a barred notice and is not placed on the no trespass list, that individual is not barred from (the premises) and management has not pursued criminal trespass violations." R. 129.

These notice forms do not inform whether one has been placed on the "no trespass list". R. 118, 120, 123, 128.

Per Mark Hamilton, there was a meeting in the Fall of 1991 between himself, Vice President Patricia Jeffers, apartment manager Sherry Allen, and Lieutenant Luecking for the Champaign Police Department, R. 197, regarding policy issues between the police and the landlord: whether landlord security would continue new July 1991 policy instigated by police, of immediately arresting alleged

trespassers or of following security policy of first asking trespassers to leave, then warning that police would be called if they didn't and finally, actually commencing arrest procedures if they did not leave. R. 198, 199. That meeting was taped, R. 197, the transcript appearing at R. 202-234, with the tape itself on record as "Mark Hamilton Affidavit Exhibit 'C' ". R. 197. The discussion included: "JEFFERS: Next also there are, there is something that's come up...from Mark as far as the legal procedures involved with trespassers on private property we wanted to discuss too to make sure we all agree and understand that...and...we wanted to talk a little bit about the procedures with, when we put someone on the barred list based on a police recommendation because we're being now challenged by individuals' attorneys and so forth so we need to be really sure that the whole procedure is very tight so we're not in a vulnerable position..." R. 204

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"HAMILTON: Um and we've gotta all work together but we don't. You know, you got somebody playing their own tune, the whole the music isn't going to sound right. LUECKING: Yea, it's got to be a cooperative effort, especially in a situation like this between us and you and management and the residents. JEFFERS: Um, I think that we've said enough on that. The only other thing that we really wanted to uh talk about was uh backup when we place someone on uh documentation, when we place someone on the list at police recommendation because we're finding we're having some problems. Uh, people are calling us, people are having their attorneys call us, going through that, kind of leaves us hanging out there so what can we do to LUECKING: You need to know... JEFFERS: In that respect...
LUECKING: You need to know why we're requesting that they be placed on the list. JEFFERS: Right. In otherwords it's somebody that you're having a problem with somewhere else in the community and you're advising us that
LUECKING: How often does that happen? ALLEN: It's been happening a lot, as a matter of fact I got two messages on my desk this afternoon to get back to on the issue.

LUECKING: No, I mean how often are we requesting that someone who's not causing us trouble here be placed on the banned list? ALLEN: That if they're not being? JEFFERS: I'm talking about what, we may have two issues here but we've agreed in the past that, uh and this was a change from when this whole first thing got initiated, it was just strictly people causing problems right on our site (sic). Then we brought it to say, and I think it was Chief Carter who said, 'Well, if we know there's a trouble-maker anywhere in the community, why don't we just put them on the list, too?', providing they're not a resident of ours and uh and you're eliminating, you know, one more problem and we said that's fine um but we we... LUECKING: I see, I wasn't aware that was happening. ALLEN: (unclear) JEFFERS: OK. Yea I think so and again well. ALLEN: Well the thing is, on some of our barred sheets, they have down on the bottom, 'per police recommendation.' LUECKING: Oh, and that's all it says? ALLEN: And that's all it says. LUECKING: Ahh. ALLEN: And so that's what we need, we need something to attach to that when the attorneys call, you know because what's happened in one of the situations, I understand is that, o.k., I've given information that it's been 'per police recommendation.' Well, 'what does that mean?' And I've said, 'well you'll have to refer to the police.' And then when they refer to the police, I understand they've said, well, we were responsible for putting them on the barred list or they wouldn't have put them on in the first place. LUECKING: Well, what we need to do. ALLEN: And then they kind of get, JEFFERS: Well, we'll deal with it as long as we have the facts. LUECKING: What we need to do JEFFERS: That way you won't have to mess with it at all. LUECKING: Is we need to tell you for each time why, I mean we might not have a copy of the police report, but it may be, like this one, the guy was armed, didn't live here and was armed by a gun, fired a gun, shots in the air. JEFFERS: Right, right. LUECKING: I always thought there had to be some connection at least in the general vicinity Birch Village or ALLEN: Yea. JEFFERS: Yea, well this was a conversation that I think basically came out of talk between

Carter and Karl Nagel. ALLEN: Oh. LUECKING: Well I would say JEFFERS: It filtered down. LUECKING: Well, I would say if we're doing that, it's our responsibility to provide you a reason." R. 227-230.

.....

"LUECKING: What you might do is, you might uh if you've got some of those that are in effect, even if they haven't been called, is that run a copy and send them and we can see if, we can attach a notice to em, why the recommendation was made and just go back and pick the ones that are that way. JEFFERS: And then you're covered from hereon and from there on back then as well. LUECKING: I'll make a point to have certain Sgt. Friedlein talk to you about it too. ALLEN: Because Kim at first, we didn't even have information on some of those barred sheets as to the reason or even the description of the person and I thought that was important you know for our security guys to alert them to some situations, you know, especially when Chicago started moving back in. Well Kim, she came and gave me copies of everything it had and we had the total description like you have at the police department, the height you know and all that, plus, why they were barred. See at first, we just had the copy of when they were served, but we didn't have any type of reasoning why and I felt uncomfortable with that, so Kim brought me everything that, you know that we had on our list(.) (T)hat was fine but now the problem is, you know 'per police recommendation'. We just need to have something to explain to me why, especially when these attorneys call. LUECKING: Well, any of those you've got in your file, if you want to make a copy of them ALLEN: Sure, I appreciate that, o.k. LUECKING: We'll, I'll have Sgt. Friedlien pick them up and we'll see if we can make some arrangements to attach a reason why, so that you'll have it and in the future, I would not write that on any of them. I would not put 'per police recommendation'. I would put 'police said suspect did or person did this'. ALLEN: Well, now your office does that. You know, these are the ones that come from the police department, you know when they're barred like at night, OK, and then they go to whatever.

LUECKING: Oh. ALLEN: You see, what I'm saying these aren't, these aren't done by our security guards. The only people that usually write these things out is either management and security guards on behalf of management and the police department in behalf of management but they are done in separate places by separate individuals. LUECKING: I thought everybody put on there like I would, why, why they were barred. ALLEN: No, no they don't. Uha. They'll have the officer's name and number, the badge number, but they won't have why they did, they just put LUECKING: Well, we'll have to stop that. ALLEN: 'per police recommendation'. LUECKING: That's perfectly reasonable." R. 229-233.

References to the landlord were made in a 1990 Champaign Police Department Public Housing Study:

"One final note concerning the use of the trespass laws to keep people off of private property. As seen in past reports, Burch Village appears to make little use of this law which allows the housing authority to create a 'banned list' of persons not allowed on public housing property. While they do have a list, it is not used to the same degree as at Parkside and Mansard Square. In looking at the reports from Burch Village we found three reports where the Champaign Police Department was listed as the victim. In comparison we found 21 such cases at Parkside with Parkside Management and the Champaign Police Department equally sharing the victims role. This law has allowed law enforcement an added tool to enforce the laws and rules at Parkside and has perhaps aided in controlling some of the problems. The trespass law is used to an even greater extent at Mansard Square which will be detailed in the next section." R. 170.

"As noted at Parkside, Mansard Square property has made effective use of the no trespass laws. In 1990, 32 cases listed either Mansard/Square management or the Champaign Police Department as the victim exclusively in trespass cases. All of these cases involved the use of the 'banned list' where management or our department would become the listed victim in order to remove person(s) from their property.

Mansard Square property uses this law more than any other public/subsidized housing property in the city." R. 173.

The following is said on tape: "LUECKING: Trespassing is just a tool HAMILTON: I understand, correct LUECKING: To get the guys, not all of them who are on the banned list are over here selling dope and causing problems. Some of them have caused problems in the past and just on it and they're here just as a place to gather, we realize that but a lot of em, some of em causing are causing trouble and selling dope, we can't prove some of those things so that's why we use trespassing HAMILTON: Right, cuz that allows you to identify each individual...you can tag em and label them and then people can keep an eye on them. And I understand that's the whole thing with trespassing and the barred list as far as basically if you can gather intelligence who most of your problem people are...", R. 214. "LUECKING:...If we see a guy who is on the banned list, we trash him, we don't tell him anything, we just tell him he's under arrest." R. 212. The police have the banned list. R. 229, V. 2, R. 38-40.

In landlord's rules appears the following: "BARRED: Management has the right to bar individuals from the property. You must inform your guest(s) of all PSMS rules and regulations. If rules and regulations are broken by your guests, they may be barred and/or arrested for criminal trespassing. If the rules and regulations are broken by a resident, it is grounds for termination of tenancy." R. 59.

The Illinois Supreme Court's interpretation of the guest exemption statute to criminal trespass resulted in new due process and state action arguments, presented in the denied Petition for Rehearing, placed in the appendix at page 37 to show federal questions. The barring notice forms do not inform of lease or rule provisions reserving landlord authority to bar persons from the premises. R. 118, 120, 123, 128. Nothing in the record show Plaintiffs privy to or knowing of any lease or rule. No tenants are parties. Nothing in the record indicates that Plaintiffs are engaging in drug sales or other illegal activities.

ARGUMENT

I. THE FACTS SHOW JOINT POLICE AND LANDLORD ENDEAVOR TO SYSTEMATICALLY RID THE PREMISES OF POLICE DEEMED UNDESIRABLES, STATE ACTION IN DEPRIVATION OF PLAINTIFFS' RIGHTS OF DUE PROCESS, MOVEMENT AND ASSOCIATION.

Not contested that involved here are Plaintiffs' First Amendment freedom of association "choices to enter into and maintain certain intimate relationships...(that)...receives protection as a fundamental element of personal liberty". Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (citations omitted). These relationships were neither chance encounters at the dance hall, Dallas v. Stanglin, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989), nor escort service, IDK, Inc. v. County of Clark, 836 F.2d 1185 (9th Cir. 1988) ("the antithesis of the highly personal bonds protected by the fourteenth amendment." Id. at 1193), nor in an "uncharted area", Collins v. City of Harker Heights, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261, 273 (1992); these are core relationships spanning decades or lifetimes involving children, grandchildren, grandparents, fathers, mothers, in-laws, relatives or close friends who live at the Parkside and Mansard Square Apartments as tenants, R. 25, 28-29, 94, 103, 105-106, 235, 237, V.1 Tr. 46-47, 51, 56-59, the exercise of which is forbidden in their homes because Plaintiffs have been barred from the premises on pain of penal sanction, criminal trespass arrest , R. 94-95, 103, 106, 235-237, and now, may no longer take advantage of statutory invitee exemption to criminal trespass, 720 ILCS § 21-3(c), because the Illinois Supreme Court has inceptively ruled their invitations invalid as a matter of law, due to a rule of the landlord stating a right to bar individuals from the premises. Clearly, as to elements of a § 1983 action, 42 U.S.C. 1983, Plaintiffs have shown "that they have been deprived of a right 'secured by the Constitution' of the United States",

Flagg Brothers, Inc. v. Brooks, 436 U.S. 139, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978), "subject to the closest scrutiny," NAACP v. Alabama, 357 U.S. 449, 460-461, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), "...' particularly careful scrutiny of the state needs asserted to justify (its) abridgment.' Poe v Ullman, supra, at (367 U.S.) 542-543, 6 L Ed 2d 989, 81 S Ct 1752 (dissenting opinion)." Moore v. City of East Cleveland, 431 U.S. 494, 502, 97 S. Ct 1932, 52 L. Ed. 2d 531 (1977) (quote by Justice Harlan). Absent this, we are in a "realm of personal liberty which the government may not enter", Planned Parenthood v. Casey, 120 L. Ed. 2d 674, 695, 112 S. Ct. 2791 (1992), seen in McKenna v. Peekskill Housing Authority, 647 F.2d 332, 335 (1981), ruling advance guest disclosure to the landlord "impinged on the tenants' freedom to have whomever they wanted visit their homes."(citations omitted), see Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill., 1989); See also Lancor v. Lebanon Housing Authority, 760 F.2d 361, 363 (1985).

The Illinois Supreme Court majority, finding no state action, misguidedly hooked onto a red herring distinction seen in the "battle of the affidavits" prior to summary judgment October 9, 1992 asserting a difference between Plaintiffs being served with a "barring notice" and being placed on a "no trespass" list, with Vice President of Property Management Jeffers saying in hers, "(m)anagement for Parkside and Mansard Square has complete and total discretion as to whether or not to place these individuals on the no trespasss list." R. 129. What caught the attention of the dissenters was "the record (showing) the police and the landlords were engaged in a joint enterprise to systematically rid the premises of those they regarded as undesirables", Williams v. Nagel, 162 Ill. 2d 542, 560, 643 N.E.2d 816, 205 Ill. Dec. 525 (1994), appendix p.16; Adickes v. Kress & Company, 398 U.S. 144, 152 90 S. Ct. 1598, 26 L. Ed 2d 142 (1970). The "... 'something more' which would convert the private party into a state actor might vary with the circumstances of the case", a " necessarily fact-bound inquiry", Lugar v. Edmondson Oil Co., 457 U.S. 922, 939, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), on the question

herein of whether "(t)he State has so far insinuated itself into a position of interdependence with (Parkside and Mansard Square) that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961).

Back in the Fall of 1991, the landlord's security company, Yale Enforcement Services, Inc., got a policy directive from management saying that persons can be barred by security, apartment employees and police, R. 196. This reflected "in writing a policy change of Parkside and Mansard Square that actually commenced around July of 1991 authorizing the Champaign Police Department to place persons on a list maintained by Parkside and Mansard Square Apartments barring individuals from the premises." R. 197. Yale manager Mark Hamilton recalled, after reviewing his tape of a Fall, 1991 meeting between himself, Vice President Patricia Jeffers, Parkside and Mansard Square Apartments Manager Sherry Allen and Lieutenant Luecking of the Champaign Police Department, "that the Champaign Police Department had been previously provided with a stack of blank forms for their preparation and use in barring individuals from the premises with the police filling them out and providing them to management, sometimes actually serving them on numerous occasions", R. 197-198, confirmed to Donald Merriweather by Champaign Police Officers Ron Durbin and John Schweihart, R. 106, 128, who decided July 29, 1991 to bar him, handing him his "Official Notice" form, id., containing no proviso regarding any final decision by Parkside and Mansard Square to place his name on the "no trespass list", R. 132 (but it did provide the basis for his criminal trespass arrest and conviction, R. 240, V. 2 Tr. 31) with the blanks and officers' names filled in. R. 228.

These forms that police fill out and either give to management or serve themselves were causing headaches for the landlord managers in the Fall of 1991, R. 197, about, per Vice President Jeffers, "the procedures ...when we put

someone on the barred list on a police recommendation because we're being now challenged by individuals' attorneys and so forth *so we need to be really sure that the whole procedure is very tight so we're not in a vulnerable position.*" R. 204. There was "a *change* from when this whole thing first got initiated (when) it was just strictly people causing problems right on our site (sic)." R. 228. What happened was a conversation between the defendants Karl Nagel and Deputy Police Chief Don Carter, R. 229, resulting in the change; that she thought "it was Chief Carter who said, '(w)ell, if we *know* there's a *trouble-maker anywhere in the community*, why don't *we* just put them on the list, too?', providing *they're not residents of ours*...and you're eliminating...one more problem and *we said that's fine* um but", R. 228, the problem for Manager Sherry Allen was the barred sheets that "have down on the bottom, 'per police recommendation'." R 229. On attorney calls about this, she tells them, its "per police recommendation", they of course, want to know what that is all about, then she tells them " 'well *you'll have to refer to the police'*...(a)nd when they refer to the police, I understand *they've* said, well, we were responsible for putting them on the barred list or *they* wouldn't have *put them on* in the first place." R. 229. In other words, she's saying "go talk to the police about their recommendation to put someone on the 'no trespass list' they have, they did it, it was their decision"; "the State is *responsible* for the specific conduct of which the Plaintiff complains." Blum v. Yarletsky, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) (Court's emphasis). Plaintiff Williams does not know the reasons the police had, other than to now assume they arbitrarily branded him as one of defendant Deputy Police Chief Carter's "troublemakers in the community", for the "Official Notice" he got on September 4, 1991 from manager Nicholson who had just taken him off the "no trespass list" two weeks earlier, R. 119. Since Plaintiff Merriweather was served his "Official Notice", commanding him not to be on the premises, "*effective immediately*", warning that if he "was seen on the Parkside and Mansard Square property", he would "be

arrested for trespassing", R. 128, directly from Champaign Police Officers Durbin and Schweihart, he had police reasoning: "his kind" was not wanted on the premises, the officers declared, R. 106, 128, doing their part in police policy of "if we know there's a trouble-maker anywhere in the community, why don't we just put them on the list too?", to which the landlord said, "*that's fine*", R. 228, with no hairsplitting distinctions for him from the police nor in their "Official Notice" they handed him about awaiting management decision whether he *would* be put on the "no trespass list" and then be subject to arrest. There are no such distinctions in the Illinois law of criminal trespass, 720 ILCS § 21-3, no affirmative defenses of not being placed on the 'no trespass list'. All that is needed for conviction is an entry on property " of another, after receiving, prior to such entry, notice from the owner or occupant that such entry is forbidden." 720 ILCS § 21-3(a). The prosecutor has no need for a list.

It is not difficult to discern from the tape done in the Fall of 1991, long before just prior to summary judgment hearing when affidavits are flying back and forth, the nature of added police involvement at Parkside and Mansard Square since July, 1991, R. 197, in putting into effect the plan of placing police labeled undesirables on the "no trespass list", R. 228, when Vice president Patricia Jeffers says, "we really wanted to...talk about...backup...documentation, when we place someone on the list at police recommendation because we're finding we're having some problems. Uh, people are calling us, having their attorneys call us, going through that, kind of leaves us hanging out there *so what can we do to*", R. 227. Lieutenant Luecking responds: "You need to know why we're requesting that they be placed on the list." R. 228. "Right.", she replies, "(i)n otherwords it's somebody that *you're* having a problem with somewhere else in the community and you're advising us", id. "How often does that happen?", asks Luecking. Manager Allen: "Its been happening a lot, as a matter of fact I got two messages on my desk this afternoon to get back to on the issue." Id. Luecking: "No, I mean how often are we requesting that

someone who's not causing *us* trouble here be placed on the banned list?" id. Vice President Jeffers clarifies: "I'm talking about what, we may have two issues here but we've *agreed* in the past that, uh and this was *a change* from when this whole first thing got initiated, it was just strictly people causing us problems right on our own site (sic). Then *we* brought it to say, and I think it was Chief Carter who said, 'Well, if we know there's a *troublemaker anywhere in the community*, why don't *we* just put them on the list too?', providing *they're not a resident of ours* and uh and you're eliminating, you know, one more problem and we said *that's fine* um but we", id. Lieutenant Luecking "wasn't *aware* that was happening." Id. The parties agreed to solve the problem of those past "Official Notices" that just have on them "*per police recommendation*", id., by having police provide reasons "why the recommendation was made", R. 231, with the unaware Luecking admonishing: "We'll, I'll have Sgt. Friedlien pick them up and we'll see if we can make some arrangements to attach a reason why, so that you'll have it and in the future, I would not write that on any of them. I would not put 'per police recommendation'. I would put 'Police said suspect did or person did this'." R. 232. Then Manager Allen explained how it works: "Well, now *your* office does that. You know, these are the *ones that come from the police department*, you know when they're barred like at night, OK, and then they go to whatever...You see, what I'm saying, these aren't, these aren't done by our security guards. The only people that usually write these things out is either management and security guards on behalf of management *and the police department on behalf of management* but they are done in separate places by separate individuals." id. Luecking assures: "Well, we'll have to stop that." R. 233.

Agreements to have police recommend deemed undesirables to landlord, police filling out names of persons they dub "troublemakers in the community" on landlord furnished "Official Notices" that have no reasons other than "per police recommendation", a landlord who gets these "Official Notices" from police and acts with no questions

until attorneys call, a police department that causes change to landlord's security procedure on confronting alleged trespassers (don't warn, just arrest), R. 198-199, with officers on the spot selecting assumed undesirables, handing out these "Official Notices" that bar persons from the premises on pain of criminal trespass arrest are " 'something more' ", Lugar, supra, 457 U.S. at 541, than "(m)ere approval of or acquiescence in the initiatives of a private party", Blum v. Yarletsky, supra, 457 U.S. at 541. It is the "joint enterprise" the dissenters spoke of, Williams v. Nagel, supra. The July, 1991 "*change* from when this *whole first thing got initiated*" per Vice President Jeffers, R. 228, is a postscript, referred to a year earlier in the 1990, Champaign Police Department Public Housing Study regarding "the *use of the trespass laws to keep people off of private property*. As seen in past reports, Burch Village appears to make little use of this law which allows the housing authority to *create a 'banned list' of persons not allowed on public housing property*. While they do have a list, *it is not used to the same degree as at Parkside and Mansard Square*. In looking at the reports from Burch Village we found three reports where *the Champaign Police Department was listed as the victim*. In comparison we found 21 such cases at Parkside with *Parkside Management and the Champaign Police Department equally sharing the victims role*. This law has allowed *law enforcement an added tool to enforce the laws and rules at Parkside* and has perhaps aided in controlling some of the problems. The trespass law is used to *an even greater extent at Mansard Square*" R. 170 which "has made effective use of the no trespass laws. In 1990, 32 cases listed *either Mansard/Square management or the Champaign Police Department as the victim exclusively in trespass cases*. All of these cases *involved the use of the 'banned list'* where management or *our department would become the listed victim in order to remove person(s) from their property*. Mansard Square property uses this law more than any other public/subsidized housing property in the city." R. 173.

So with the 1991 July policy change, police said, not only will they aid the landlord with the "*use of the no*

trespass laws to keep people off of private property", by "*use of the 'banned list' where...our department would become the listed victim in order to remove person(s) from their property*", supra, (the police have it R. 229, V.2 Tr. 38-40 and per Luecking, "if we see a guy who *is on the banned list*, we trash him, we don't tell him anything, we just tell him he's under arrest." R. 212), they will help the landlord "*create a 'banned list' of persons not allowed*", on his property by referring police deemed community undesirables. Plaintiffs submit that when Vice president Jeffers caveats with "*providing they're not residents of ours*" R. 228, arguably, these could very well be the only ones that don't make the "banned list", given a fair examination of the taped meeting, regarding the necessity for the parties, per Vice President Jeffers, "to be really sure that the whole procedure is very tight so that we're not in a vulnerable position." R. 204 (a "genuine issue as to (a) material fact" in summary judgment procedure, 735 ILCS § 5/2-1005).

It cannot be said that this case is one where the Champaign Police Department "plays absolutely no part in establishing or enforcing", Moose Lodge v. Irvis, 407 U.S. 163, 175, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972) the "no trespass" program at Parkside and Mansard Square, where the landlord "alone is responsible for the", Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358, 95 S. Ct. 449, 42 L. Ed. 2d 449 (1974), endeavor with a "total absence of overt official involvement", Flagg Brothers, Inc. v. Brooks, supra, 436 U.S. at 157. The police recommendations of people they deem "troublemakers anywhere in the community" (usually judicial decisions rather than executive, where fundamental freedoms are denied) are simply not "judgments made by private parties", Blum v. Yarletsky, supra, 457 U.S. at 1008 (recommendations done by private physicians to private nursing home administrators as to the level of patient care). But it can be said that the police are involved with the Parkside and Mansard Square "Official Notices", security policy and the use of these "banned lists" they have and help create to "*become the listed victim in order to remove person(s) from their property*", R. 173, that

"(t)his involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." Tulsa Collection Services v. Pope, 485 U.S. 485, 487, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) and that "it can be fairly said that the city itself is the wrongdoer." Collins v. City of Harker Heights, supra, 117 L. Ed. 2d at 271. This is no "single incident of unconstitutional activity", Oaklahoma City v. Tuttle, 471 U.S. 808, 824-825, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). It can be said and has been said by Lieutenant Luecking that "(t)respassing is just a *tool*" of the Champaign Police Department, "*(t)o get the guys*, not all of them who are *on the banned list are over here selling dope and causing problems*. Some of them have caused problems in the past and just on it and they're here just as a place to gather, we realize that but a lot of em, some of em causing *are causing trouble and selling dope, we can't prove some of those things so that's why we use trespassing...*" R. 214. Mark Hamilton of Yale understood how this tool works: "Right, cuz that allows you to identify each individual...you can tag em and label them and then people can keep an eye on them...", id, and arrest them for "*some of those things*" an officer "*can't prove*" by charging a simple, class "C" misdemeanor trespass, 720 ILCS § 21-3(a), (not more than 30 days imprisonment, 730 ILCS § 5-8-3(a)(3)) and do a search incident to an arrest without a warrant, 725 ILCS § 5/108-1(d), id., to try to find "*some of those things*". This, Plaintiffs submit, was what was referred to in the 1990 Public Housing Study: "This law has allowed *law enforcement an added tool to enforce the laws*", supra, "a law enforcement technique designed for the convenience of law enforcement", Lambert v. California, 355 U.S. 225, 229, 78 S. Ct. 240, 2 L. ED. 2d 228 (1957).

This Petition for Writ of Certiorari should be allowed: the record of concern to the Illinois Supreme Court dissenters (this case ought not be distinguished as it was in Meyer v. Village of Carpentersville, 1994 U.S. Dist. Lexis 3257 (N.D. Ill., 1994), appendix page 51) shows that Plaintiffs may be guests of Parkside and Mansard Square Apartments "only at the whim of any officer" of the Champaign Police

Department based on his " 'moment to moment opinions'" of whether they are undesirables and this "bears the hallmark of a police state", Shuttlesworth v. Birmingham, 382 U.S. 87, 91, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965), that disregards freedom to associate ("It is plain that the interest of a parent in the companionship...of his or her children '(c)omes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic relationships.' ", Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (citation omitted)), usually "implicates consideration of the constitutional right of movement", Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (at least, in People v. Pickens, 186 Ill. App.3d 456, 542 N.E.2d 1253, 134 Ill. Dec. 746 (4th Dist., 1989), a probationer, deprived of her liberty after conviction for prostitution at a sentencing hearing barring her from a geographical area by a judge, could ask a probation officer for permission to enter for legitimate reason, i.e., a visit) and always violates a free society's norm of "procedural due process" where "some kind of prior hearing is paramount", Board of Regents v. Roth, 408 U.S. 564, 569, 570, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), such as "by an impartial jury of the State", Amend. VI, Const., before the State brands individuals as "troublemaker(s) anywhere in the community", R. 228, and deprives them "of...liberty", Amend. XIV, Const.

II. THE RULING THAT INVITEE EXEMPTION TO TRESPASS IS UNAVAILABLE TO GUESTS OF TENANTS UNDER RULES RESERVING LANDLORD BARMENT AUTHORITY, INVALIDATING INVITATIONS AS A MATTER OF LAW, VIOLATES DUE PROCESS, CRIMINAL COURT ENFORCEMENT BEING STATE ACTION.

This sua sponte ruling that a landlord/tenant lease clause or rule invalidates guest invitation, neither briefed nor argued by the parties, is "so clearly at variance with the statutory language" of § 21-3(c), 720 ILCS, and so without

"the slightest support in prior" Illinois substantive law, Bouie v. Columbia, 378 U.S. 347, 356, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), that Plaintiffs ought not be bound, id., and neither they nor any guest in Illinois, not privied to a lease his tenant invitor has with a landlord, be subject to criminal trespass arrest for exercising an invitation because close examination shows it violative of due process, Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966). While this Court is bound by interpretations placed on a statute by state courts, e.g. R.A.V.v. St. Paul, 112 S. Ct. 2538. 120 L. Ed. 2d 305 (1992) Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (but see note 3 therein: "If the regulation in question established a standard of conduct to which the probationer had to conform on pain of penalty -- e.g., a restriction on his movements -- the state court could not constitutionally adopt so unnatural an interpretation of the language that the regulation would fail to provide adequate notice. Cf. Kolender v. Lawson, 461 U.S. 352, 357-358 (1983): Lambert V. California, 355 U.S. 225, 228 (1957)." Id. at 875), cf. Wisconsin v. Mitchell, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), Terminiello v. Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949), it will apply facial analyses to them to ascertain constitutionality in both the due process, Kolender v. Lawson, supra, Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 102 L. Ed. 2d 349 (1963) and First Amendment context, Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S.Ct. 2568, 96 L. Ed. 2d 500. (1987), Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971), Ashton v. Kentucky, supra (both: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely", 384 U.S. at 200).

Plaintiffs have no quarrel that indeed, they must have valid invitations in *fact* from their tenant invitees. Obviously, coerced or fraudulently obtained invitations are tainted. But now, invitations are invalid if landlords have lease or rule reservations with tenants, such as: "Management has the right to bar individuals from the property." R. 59. Barred

guest invitations are invalid because it invalidates tenant invitations, per the ruling. Not privy to any leases in this case, Plaintiffs have no clue that their invitations may be invalid as a matter of law. They don't get any on reading 720 ILCS § 21-3(c) that not at all says: "This Section does not apply...to anyone invited by...(a tenant)...to visit him at the place he is...living... *except where a landlord reserves a provision in the lease the right to bar any person from the property and give notice specified in subsection(a)*", see Lanzetta, infra, and they don't get any from these "Official Notices" that admonish "(t)his is the *only* notice you will receive. If you are seen on the Parkside and Mansard Square property as of_____you will be arrested for trespassing." R. 118, 120, 123, 128, see Greene v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982). Since sections 21-3(a) and (c), 720 ILCS, are criminal statutes, Lanzetta vs. New Jersey, 306 U. S. 451, 453, 56 S. Ct. 618, 83 L. Ed. 888 (1939) applies:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. CT. 126: 'That the *terms* of a penal statute *creating a new offense* must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " (emphasis added)

In not being included in the statutory exemption of tenant's guests to criminal trespass language, the Illinois

Supreme Court's substantive inclusion of it is in violation of the foregoing. "It would be hard to hold that, in advance of judicial utterance upon the subject, (Plaintiffs) were bound to understand the challenged provision according to the language later used by the court." Id., 306 U.S. at 456 (challenged here by defendants with the narrow, "migrant worker" limitation to the guest exemption statute, accepted by the Fourth District Appellate Court, apparently not by the Illinois Supreme Court); Bouie v. Columbia, supra (See United States v. Wiltberger, 18 U.S. 76, 96, 5 L. Ed. 37, 5 Wheat. 76 (1820): "The case must be a strong one indeed, which would justify a court from departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within a statute, its language must authorize us to say so. It would be dangerous...to punish a crime not enumerated in the statute...", per Chief Justice Marshall (federal statute)). The sua sponte ruling, essentially creating a new criminal trespass offense aimed at guests the landlord or police don't like, itself violates due process, ab initio. Potential guests of a tenant in Illinois must now successfully guess on pain of penal sanction whether their invitations come within the exemption provision of a statute and if a private lease provision or rule they are not privy to authorizing barment by a landlord exists. There are no guidelines as to when the landlord can take a person from within the statutory exemption to trespass prosecution for being an invited guest of one of the landlord's tenants, Kolender v. Lawson, supra. All that is needed is a blanket rule to criminalize a visit: "Management has the right to bar individuals from the property." R. 59. There are no standards in bestowing landlords this sweeping authority over tenants and their guests, let alone Constitutional standards, Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967). In this case, there are particularly no standards, where we have a police department authorized to recommend barment of deemed undesirables; rather, "arbitrary and discriminatory enforcement", Kolender v. Lawson, supra, 461 U.S. at 357, is encouraged. If landlords are going to be

empowered to exclude what the legislature had previously exempted from trespass arrest, the Constitution requires better standards than the police defined crime of being "troublemakers anywhere in the community", R. 228, better notice to Plaintiffs regarding the conditions under which their conduct will be prohibitted, other than guesses on pain of penal sanction of what a statute says and what the landlord's lease says, with some consideration of First Amendment values to associate. The authority the Illinois Supreme Court has given landlords regarding who may or may not visit, enforceable in the criminal courts, regardless of association rights, does not measure up to First Amendment standards on a facial analysis where " 'there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court...' " Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., supra 482 U.S. at 574 (emphasis added), bluntly recognized by the dissenters:

> "Under established law, plaintiffs have thus advanced a cognizable claim under 42 U.S.C. § 1983 (1988) against the various defendants named in their amended complaint. By ruling otherwise, the majority eviscerates the statute and gives free reign to private landlords to substitute the coercive power of the police for the civil eviction remedies created by our General Assembly. Until today, the sole recourse for a landlord who disapproved of his tenant's guests was to terminate the tenancy. Now, there is no longer a need to bother with civil process. The landlord can just call the police and have the tenant's guests hauled away to jail. *That the guests may include the father of the tenant's children, or the tenant's son, or some other family member is apparently of no consequence.*" Williamsv. Nagel, supra, 162 Ill. 2d at 560-61, appendix page 17 (emphasis added).

Plaintiffs respectfully submit, both on behalf of themselves and all guests who may be affected by the Illinois

Supreme Court's sua sponte, procedurally defective, substantive change to criminal trespass law, that this Court should allow their Petition for Writ of Certiorari: "Because of the chilling effect...(it)...might have on the freedoms of.... association,... expedited determination of its constitutionality is preferabie." IDK, Inc. v. County of Clark, supra, 836 F.2d at 1190. Just getting one of those "Official Notices" promising trespass arrest will interrupt a visit.

This "exception to the exception" to trespass exemption for tenant guests, now places the judiciary in the position of enforcing a scheme violative of the Fourteenth Amendment, Tulsa Collection Services v. Pope, supra, by placing the criminal courts behind a landlord's private predilections as to who may visit his tenants, aggravated in this case where the police are recommending to the landlord names of deemed undesirables to a landlord who routinely acts, no attention given to rights to associate or to present reasons to the State why a person's liberty ought not be taken, Shelley v. Kramer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, (1947).

The facts of Lugar v. Edmondson Oil Company, supra, parallel this case somewhat, but for in Lugar, there was a procedurally defective attachment of property statute , where "...pursuant to state law, Edmondson sought prejudgement attachment of certain of...(Lugar's)...property... The prejudgment attachment procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered (Lugar's) property...", 457 U.S. at 924-925 (citation omitted). Similarly, the new procedural scheme works like this for landlords who, before the ruling, had no power to forbid valid in fact invitations of their tenants: They obtain a lease reservation or a rule governing tenants warranting their authority to ban, subjecting all invitations to invalidation, ban whomever from the homes of tenants on whatever pretext (or on police recommendation) and then

swifter than the ex parte petition procedure Edmondson had to undergo to sequester only property, they dial 911 or update the list over at the police station, V. 2, R. 39-40 ("If we see a guy who *is on the banned list*, we trash him, *we don't tell him anything*, we just tell him he's under arrest", Luecking, R. 212) to have a guest, who has nothing to do with the landlord's lease, arrested to face criminal prosecution for trespass. This is "...private use of...challenged state procedures with the help of state officials...(which)... constitutes state action for purposes of the Fourteenth Amendment." Id., 457 U.S. at 933. The Court noted that "while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well." Id, 457 U.S. at 941, cf. Albright v. Oliver, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). That second element was met in Lugar because "when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute", id. , "(w)e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." Plaintiff Williams is invited by tenant Lorraine Cowart to visit her and their child at her apartment. V. 1, Tr. 59. The landlord bars him, "on recommendation from the Champaign Police Department. (Based on police reports)." R. 118. Unknown to him, because of a provision in a private document, there is a lease clause or tenant rule he is not privy to that empowers the private landlord to bar anyone from tenant Cowart's apartment, R. 59, which, per the ruling, nullifies tenant guest exemption to trespass. The landlord now has the authority to have him seized by police with his appearance required in the criminal courts for trespass, an ex parte application of the first magnitude based on a constitutionally flawed scheme that "violates the first essential of due process of law."

Lanzetta, supra, 306 U. S. at 453. The private landlord now becomes a joint participant with the State in this, a state actor, more so in this case where the basis for Plaintiff Williams banishment is a "recommendation" by the Champaign Police Department (more than in Adickes, supra, where "...petitioner... will be entitled to relief under § 1983 if she can prove that a Kress employee...and a Hattiesburg policeman...reached an understanding...", 398 U.S. at 152). The lesson of Lugar, supra, that court enforcement of law violative of the Fourteenth Amendment provides the basis for a § 1983 action was affirmed: "Although the private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action...our cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials' ", Edmonson vs. Leesville Concrete Co., 500 U. S. 614, 622, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) (citation omitted). "(A) private party could not exercise its peremptory challenges" without such assistance by the courts. Id., 500 U.S. at 624. We now have use by landlords of criminal trespass laws, *public* remedies, to enforce private leases that peremptorily banned guests are not a party to in the criminal courts, the validity of their invitations hinging on these contracts they neither receive notice of nor may contest when prosecuted because they are not privy to them.

CONCLUSION

Yes, Plaintiffs do have their elements for a § 1983 claim against the landlord and the municipality on this summary judgment record, as noted by the dissenters, but they respectfully submit their litigation has resulted in an unfortunate ruling that private landlords may alter state criminal trespass law in a contract, a ruling that has a profound impact on tenant and guest relationships in Illinois, especially those "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion of others in critical aspects of the relationship." Roberts v. United States

Jaycees, supra, 468 U.S. at 620, not considered below. For this reason, they respectfully request that their Petition for issuance of a Writ of Certiorari to the Illinois Supreme Court be allowed so that this Court may review and settle the federal questions presented above. If "peaceable assembly for lawful discussion cannot be made a crime" De Jonge v. Oregon, 299 U.S. 353, 365, 81 L. Ed. 278, 274 (1937), a visit ought not be one either.

Respectfully Submitted,

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Clark and Donald F. Merriweather

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APPENDIX

I. ORAL RULING OF THE TRIAL COURT, OCTOBER 9, 1992, SIXTH JUDICIAL CIRCUIT COURT, CHAMPAIGN COUNTY

"THE COURT: All Right. the law favors an opportunity to people who claim injury to have an opportunity to state their claim, state the relief which they seek, and I have always understood the law to be that great latitude ought to be permitted to persons seeking a stated claim, and I have always applied the law so as to permit wide latitude in attempting to state claims. I think it prudent, appropriate, and I think it what the law requires that plaintiffs be given the greatest of latitude in attempting to re-plead. In this particular case it seems to me that the several hearings and the filings which have been presented have fleshed this situation out about as completely as it can be.

In considering the motion for summary judgment, it is my obligation to see whether in fact there are genuine issues of material fact here, considering the arguments, and the filings. I have considered the matters from prior hearings which I have been invited to consider.

In considering the motion for summary judgment, it seems to me that this record presents a private entity operating housing and operating it in a prudent fashion, attempting to provide a safe, healthy environment. It seems to me that the record portrays a perfectly reasonable, understandable, and commendable relationship between that private landlord and the police department, in an attempt to ensure that the residents of the landlord housing are safe, that they have a law-abiding requirement that they are protected from criminal acts. I see nothing in this record, and again, I think it as fleshed out as it's going to get.

I see absolutely nothing in this to indicate that the private defendant is engaged in any sort of state action. I see nothing in this record to indicate, under any of the theories

which I understand plaintiffs to be intending to allege, I see no genuine issue of material fact. I believe the private defendants are not only entitled to summary judgment, but are entitled to an indication, that the positive steps to provide a safe environment for their tenants, what a relationship between landlord and the police are supposed to be about. Now as I think it clear from the focused question that I tried t direct at the end, really the only concern that I am left with as to the City, and its employees, has to do with the possibility that persons might be served with the notice telling them to be off the premises at a time when the persons did not appear on the landlord-generated no-trespass list.

It seems to me that as to that situation and all other situations that I see each of these plaintiffs attempting to plead, there simply no pleading, there is simply no genuine issue o f material fact.

There is no basis on this record under which the Defendant City or its employees can be held to be liable for the conduct portrayed. I grant each of the motions for summary judgment on behalf of all defendants and against all plaintiffs. Again my view is that re-pleading would be appropriate in many cases. Here I think re-pleading simply would serve to unduly lengthen the proceedings, and not provide any further flesh on the issues that are presented. Written orders are to be entered. Counsel for the prevailing party are to prepare proposed orders within seven days of today's date, provide them to opposing (sic) counsel. Written objections and the original orders are to be submitted within fourteen days of today's date, and I will enter forms of order reflecting my rulings without the necessity of any further hearing. We'll be in recess." V2, Trans. 41-44.

II. ILLINOIS SUPREME COURT OPINION

LAWRENCE A. WILLIAMS et al., Appellants, v. KARL NAGEL et al., Appellees.

WILLIAMS v. NAGEL

Docket No. 76442

SUPREME COURT OF ILLINOIS

162 Ill. 2d 542; 643 N.E.2d 816; 1994 Ill. LEXIS 146; 205 Ill. Dec. 525

October 27, 1994, Filed

NOTICE: [**1]
THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

SUBSEQUENT HISTORY: Petition for Rehearing Denied December 5, 1994.

DISPOSITION: Affirmed.

JUDGES: BILANDIC, HARRISON, FREEMAN

OPINIONBY: BILANDIC

OPINION: [*544] CHIEF JUSTICE BILANDIC delivered the opinion of the court:

The plaintiffs, Lawrence A. Williams, Mansion W. Clark, and Donald F. Merriweather were arrested for criminal trespass to land (Ill. Rev. Stat. 1991, ch. 38, par. 21-3) when they entered a private apartment complex in Champaign, Illinois, owned by the defendants, the Nagel Group, Inc. The plaintiffs also filed suit against the City of Champaign and two Champaign police officers, alleging that the City had developed a policy of barring persons from the apartment complex in violation of plaintiffs' civil rights. (42 U.S.C. § 1983 (1988).) The trial court granted summary judgment in favor of all defendants. That judgment was affirmed by the

appellate court. (251 Ill. App. 3d 176.) We granted [*545] the plaintiffs' petition for leave to appeal. (145 Ill. 2d R. 315.) For the following reasons, we affirm the judgment of the appellate court. [**2]

FACTS

The Nagel Group, Inc. (Nagel Group), a private corporation doing business as Champaign Housing Associates, owns and operates a multiunit rental apartment complex in Champaign known as Parkside and Mansard Square Apartments (Parkside Apartments). The Nagel Group receives Federal funds in the form of rent subsidies through the office of Housing and Urban Development (HUD), and abides by HUD's regulations. All tenants residing in the Parkside Apartments are subject to the provisions contained in the lease and the Parkside Apartments rules and regulations. The Parkside Apartments rules and regulations contain the following provision:

"32. BARRED: Management has the right to bar individuals from the property.

You must inform your guests of all [Parkside and Mansard Square Apartments] rules and regulations. If rules and regulations are broken by your guests, they may be barred and/or arrested for criminal trespassing. If the rules and regulations are broken by a resident, it is grounds for termination of tenancy."

The management recorded the names of individuals that received the above notice on a "barred list." The Champaign police department and other local police authorities [**3] made recommendations to the management of Parkside Apartments to place individuals on the barred list because of their involvement in drug sales or other illegal activity. The following entities served notice to individuals barred from the complex: the Champaign police department, Yale Enforcement Service, Inc. (the security firm employed by Parkside Apartments), and the management of Parkside Apartments.

The barred notice provides that, effective immediately, the recipient of the notice is prohibited from [*546] entering the premises of Parkside Apartments, including the common areas and parking lots, and is subject to arrest for trespass if

found on the property. After an individual receives a barred notice, the management of Parkside Apartments decided whether that person's name should be placed on a "no trespass" list. If an individual who has received a barred notice and has also been placed on the "no trespass" list enters the premises of Parkside Apartments, they are subject to arrest for criminal trespass to land. (Ill. Rev. Stat. 1991, ch. 38, par. 21-3.) However, if an individual has only received a barred notice without being named on the "no trespass" list, management will not [**4] pursue criminal trespass violations against the individual if he or she enters the property.

The plaintiffs, who are not residents of Parkside Apartments, each received a notice barring them from entering the apartment complex and were subsequently arrested for criminal trespass to land because they entered the premises after they were barred therefrom. In their first amended complaint, plaintiffs claim that various friends and family members who are residents of Parkside Apartments extended open and permanent invitations to them to visit at their apartments. The plaintiffs allege that the barring practice employed by Parkside Apartments violates due process and constitutes impermissible State action because the Champaign police department decided which names should be placed on the "no trespass" list. Plaintiffs also claim that pursuant to section 21-3(c) of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38, par. 21-3(c)), they had a statutory right to be present in the complex because of the invitations extended to them by certain tenants.

Before trial, the plaintiffs moved for both a temporary restraining order and preliminary injunction to [*547] force the Nagel Group to permit [**5] them to enter the apartment complex. Upon motion by the defendants, the trial court entered summary judgment in favor of all defendants. The plaintiffs appealed the denial of the temporary restraining order, preliminary injunction, and the order granting summary judgment in the defendants' favor.

On review, the appellate court determined that the plaintiffs failed to file a timely appeal from the trial court's denial of the temporary restraining order and preliminary injunction. Additionally, the appellate court upheld the trial court's grant of summary judgment in defendants' favor, finding that the plaintiffs had presented no facts to show that their

constitutional rights were violated. In this regard, the appellate court found that plaintiffs had failed to demonstrate "state action" necessary to establish a due process violation. The appellate court also found that plaintiffs had no common law or statutory right pursuant to section 21-3(c) of the Criminal Code to enter the complex. Accordingly, the appellate court affirmed the judgment of the trial court.

ANALYSIS

A motion for summary judgment should be granted when the pleadings, depositions, and affidavits reveal that there is [**6] no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Ill. Rev. Stat. 1991, ch. 110, par. 2-1005(c); Balla v. Gambro, Inc. (1991), 145 Ill. 2d 492, 508, 164 Ill. Dec. 892, 584 N.E.2d 104.

I

Before this court, the plaintiffs initially challenge the appellate court's determination that their due process rights were not violated. The plaintiffs argue that summary judgment was improperly granted because the [*548] police involvement in barring plaintiffs from visiting their relatives and friends constitutes State action that violates their constitutional rights to freedom of movement, freedom of association and due process afforded by both the United States and Illinois Constitutions. In addition, plaintiffs argue, the barring practice employed by the defendants subjects them to false imprisonment and is an unlawful restraint upon their right to liberty.

The fourteenth amendment to the Constitution provides in relevant part that "no State shall * * * deprive any person of life, liberty, or property, without due process of law * * *." (U.S. Const., amend. XIV.) The fourteenth [**7] amendment erects "no shield against merely private conduct, however discriminatory or wrongful." (Shelley v. Kraemer (1948), 334 U.S. 1, 13, 92 L. Ed. 1161, 1180, 68 S. Ct. 836, 842; Moose Lodge No. 107 v. Irvis (1972), 407 U.S. 163, 32 L. Ed. 2d 627, 92 S. Ct. 1965.) Therefore, in order to establish a violation of constitutional rights, a plaintiff must demonstrate that the conduct complained of is conduct by the State rather than conduct of private parties. Where the conduct is that of a private party, a plaintiff may establish State action by

showing that the State has "significantly involved itself with invidious discriminations." (Reitman v. Mulkey (1967), 387 U.S. 369, 380, 18 L. Ed. 2d 830, 838, 87 S. Ct. 1627, 1634.) Upon such a showing, the discriminatory action will be imputed to the State and thereby fall within the ambit of the constitutional prohibition. There is no hard and fast rule to determine whether allegedly discriminatory conduct is private or whether the conduct amounts to "State [**8] action." "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority (1961), 365 U.S. 715, 722, 6 L. Ed. 2d 45, 50, 81 S. Ct. 856, 860.

[*549] In Blum v. Yaretsky (1982), 457 U.S. 991, 1002, 73 L. Ed. 2d 534, 545, 102 S. Ct. 2777, 2785, the United States Supreme Court outlined a three-part analysis to determine whether State action exists. First, the complaining party must show that "'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" (Blum, 457 U.S. at 1004, 73 L. Ed. 2d at 546, 102 S. Ct. at 2786, quoting Jackson v. Metropolitan Edison Co. (1974), 419 U.S. 345, 351, 42 L. Ed. 2d 477, 484, 95 S. Ct. 449, 453.) The purpose of [the close nexus] requirement is to assure that constitutional [**9] standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." (Emphasis in original.) (Blum, 457 U.S. at 1004, 73 L. Ed. 2d at 546, 102 S. Ct. at 2786.) Second, the State can be held responsible for private conduct only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the conduct must in law be deemed to be that of the State. (Blum, 457 U.S. at 1004, 73 L. Ed. 2d at 546, 102 S. Ct. at 2786; see also Flagg Brothers, Inc. v. Brooks (1978), 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729.) Third, the required nexus may be present if the private entity has exercised powers that are "'traditionally the exclusive prerogative of the State.'" Blum, 457 U.S. at 1005, 73 L. Ed. 2d at 547, 102 S. Ct. at 2786, quoting Jackson, 419 U.S. at 353, 42 L. Ed. 2d at 485, 95 S. Ct. at 455. [**10]

In their first amended complaint, plaintiffs allege that the Champaign police department, at the instigation and direction of the two named defendant police officers, Donald Hanna

and Don Carter, instituted a policy approved and jointly executed by the other defendants, whereby the Champaign police department became intimately involved and controlled virtually all [*550] aspects of the procedure to bar plaintiffs from the apartment complex. The plaintiffs contend that the Nagel Group's tacit approval of the plan designed and implemented by the Champaign police department and its two police officers provides a sufficiently "close nexus" to constitute State action.

We reject plaintiffs' argument. Review of the affidavits submitted by the defendants belies plaintiffs' contention that the Nagel Group simply acquiesced in the plan allegedly developed by the Champaign police department that resulted in the plaintiffs' arrest for criminal trespass. Patricia Jeffers, vice-president of property management for the Nagel Group, submitted an affidavit describing the security process at Parkside Apartments. Jeffers stated that police officers and security officers have served barred notices to individuals [**11] at Parkside Apartments. After an individual is served with a notice by a police officer or security officer, Parkside Apartments requires that notification be given to the management. Following such notification, Parkside Apartments makes a determination as to whether that individual should be placed on the "no trespass" list. Jeffers stated that there have been occasions where management decided against following the recommendations of the police officers. In her affidavit, Jeffers stated that:

"Management for Parkside * * * has complete and total discretion as to whether or not to place these individuals on the no-trespass list."

Likewise, the affidavit of Mark S. Hamilton, the manager of Yale Enforcement Service, corroborates Jeffers' description of the security process in effect at Parkside Apartments. He also stated that security for Parkside Apartments, employees of Parkside Apartments, and police officers had the authority to and did serve barred notices. However, no one was able to place an individual on the "no trespass" list except the employees of [*551] Parkside Apartments. If an individual was served with a barred notice but was not placed on the "no trespass" [**12] list, security would not call the police to arrest that person when found upon the premises.

Defendant Donald Hanna, the former chief of police for the City of Champaign, submitted an affidavit stating that there was no policy, custom or practice of the police department to bar persons from entering any private property, including the premises of the Parkside Apartments. If persons were barred by the property owners, the police department would enforce the trespass laws. Hanna stated that the decision to bar persons from the complex was not made by the police department or through any policy of the police department. As chief of police, Hanna was not authorized by the Champaign city counsel to bar persons from private property or to make any policy that would permit police officers to make the decision to bar persons from private property.

Defendant Don Carter, the acting chief of police and former deputy chief of the Champaign police department, also submitted an affidavit stating that the Champaign police department had no policy to bar persons from Parkside Apartments. Carter stated that he was not aware of any policy of the Champaign police department to control the decision of [**13] the management of Parkside Apartments to bar persons from the property, nor did the police department make the decision to place the plaintiffs on the "no trespass" list. While the police officers did occasionally provide recommendations to private property owners concerning individuals who had been involved in criminal activity, such advice was not always followed. The police department did, however, enforce the criminal trespass laws.

Application of the three-part analysis developed in Blum to the instant case leads to the unmistakable [*552] conclusion that the plaintiffs have presented no facts to show a sufficiently "close nexus" between the conduct of the Champaign police department and the Nagel Group to establish State action. While it is true that the Champaign police department did serve the barred notices, such conduct, in many instances, was borne out of necessity. The record establishes that the police were often present to disperse unruly groups and intervene in altercations as they arose in the complex.

Most importantly, a barred notice alone would not subject an individual to arrest. As defendants point out, the only individuals subject to arrest for criminal trespass [**14] were those placed on the "no trespass" list. While the Nagel Group may have heard recommendations from the

Champaign police department as to whom should be placed on the "no trespass" list, such recommendations were purely advisory and the management of Parkside Apartments made all decisions concerning the "no trespass" list of its own accord. The affidavit submitted by property manager Patricia Jeffers of the Nagel Group unequivocally states that the management of Parkside apartments reserves "complete and total discretion" as to whether or not to place an individual on the "no trespass" list. Jeffers' affidavit is corroborated by the affidavit of Mark Hamilton of Yale Security Services, who also clarified that a distinction exists between being served a barred notice and actually being placed on the "no trespass" list. Hamilton stated that no one was able to place an individual on the "no trespass" list except the employees of Parkside Apartments. Finally, Hanna and Carter testified that there was no policy, custom or practice of the Champaign police department to bar persons from the Parkside Apartments. However, if persons were barred from private property by the owners, the police [**15] department would enforce the trespass laws.

[*553] The defendants' affidavits reveal that the decision as to which individuals should be placed on the "no trespass" list rested in the sole discretion of the private property owners. The only evidence provided by the plaintiffs to suggest otherwise is found in Hamilton's affidavit, which contains the sentence that the Champaign police department had the authority to bar individuals from the complex. However, as we have discussed, the pivotal inquiry here focuses upon the placement of an individual's name on the "no trespass" list because it would subject an individual to arrest for criminal trespass, and not mere service of a barred notice. The service of a barred notice is a precondition to an individual's prosecution for trespass by providing notice that entry is forbidden. (Ill. Rev. Stat. 1991, ch. 38, par. 21-3.) The receipt of a barred notice does not, in and of itself, subject an individual to arrest. The affidavit of Mark Hamilton stated that if an individual were served a barred notice but not placed on the "no trespass" list, the security department would not call the police department to arrest the individual for trespass.

Upon [**16] review of the pleadings and affidavits submitted by the parties, we find that the plaintiffs have failed to raise any material question of fact concerning whether placement of an individual's name on the "no

trespass" list constitutes State action. As a matter of law, we find that the placement of an individual's name on this list amounts to purely private conduct of the defendant Nagel Group. The Champaign police department neither placed individual names on the list nor exercised coercive power over the Nagel Group to decide which individuals should be placed on the "no trespass" list. As noted in Blum, "mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." (Blum, [*554] 457 U.S. at 1004-05, 73 L. Ed. 2d at 547, 102 S. Ct. at 2786.) Accordingly, we find that summary judgment was properly entered in favor of all defendants because the plaintiffs have failed to establish that the conduct complained of constitutes State action.

II

Alternatively, the plaintiffs assert that the Nagel Group [**17] has violated their statutory right to enter the private apartment complex because they were invited onto the premises by certain tenants in the apartment complex. The plaintiffs' statutory claim is based upon section 21-3 of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38, par. 21-3), which provides in relevant part:

"§ 21-3. Criminal trespass to real property. (a) Whoever enters upon the land or a building, other than a residence, or any part thereof of another, after receiving, prior to such entry, notice from the owner or occupant that such entry is forbidden, * * * commits a Class C misdemeanor.

* * *

(c) This Section does not apply to any person, whether a migrant worker or otherwise, living on the land with [the] permission of the owner or of his agent having apparent authority to hire workers on such land and assign them living quarters or a place of accommodations for living thereon, nor to anyone living on such land at the request of, or by occupancy, leasing or other agreement or arrangement with the owner or his agent, nor to anyone invited by such migrant worker or other person so living on such land to visit him at the place he is so living upon the land." Ill. [**18] Rev. Stat. 1991, ch. 38, par. 21-3(c).

The plaintiffs contend that section 21-3(c) carves an exception for circumstances such as those found in the present case where invitations have been extended to them by tenants residing in the apartment complex. However, section 21-3(c) is inapplicable in the instant case, for the plaintiffs had not received a valid invitation [*555] from the tenants. As previously discussed, the tenants executed a lease at the time they moved into Parkside Apartments which stated that they agreed to abide by the provisions contained in the lease and the Parkside Apartments rules and regulations. As set forth in the rules and regulations:

"Management has the right to bar individuals from the property. You must inform your guests of all [Parkside and Mansard Square Apartments] rules and regulations. If rules and regulations are broken by your guests, they may be barred and/or arrested for criminal trespassing. If the rules and regulations are broken by a resident, it is grounds for termination of tenancy."

In addition, the lease provides that the resident agrees to obey additional rules if the rules are reasonably related to the safety, care and cleanliness [**19] of the building and the safety, comfort and convenience of the residents.

A lease is a contract between landlord and tenant. (Perry v. Waddelow (1956), 145 F. Supp. 349.) The same rules are applicable to the construction of leases that are applicable to the construction of other contracts. (See Valentin v. D.G. Swanson & Co. (1960), 25 Ill. App. 2d 285, 167 N.E.2d 14; 7039 Wentworth Avenue Building Corp. v. Trough (1947), 332 Ill. App. 635, 76 N.E.2d 350.) In the instant case, the tenants' failure to comply with the rules and regulations promulgated by the management of Parkside Apartments would constitute a breach of contract. See 7039 Wentworth Avenue Building Corp., 332 Ill. App. at 637.

As a condition to moving into the apartment complex, tenants agreed to abide by the terms set forth in their lease as well as the rules and regulations promulgated by the management. One of the terms to which tenants agreed was that Parkside Apartments, as lessor, reserved the right to bar persons from its property. Any tenant's [**20] attempt to invite an individual onto the property who had already been barred by management [*556] would result in breach of the lease. Here, the plaintiffs had been barred from the premises

by management. As a result, any attempt by tenants to invite the plaintiffs onto the premises would be invalid. Therefore, since a valid invitation was never extended to the plaintiffs, they do not fall within the scope of the exception set forth in section 21-3(c). Accordingly, we reject the plaintiffs' argument that the management of Parkside Apartments violated their statutory rights under section 21-3(c) to enter the property. Ill. Rev. Stat. 1991, ch. 38, par. 21-3(c).

III

As a final matter, plaintiffs claim that Justice Robert J. Steigmann, a member of the appellate panel that decided this case on review, was prejudiced against plaintiff Williams. In 1971, Justice Steigmann was an assistant State's Attorney, and prosecuted Williams for armed robbery. Following Williams' petition to obtain executive clemency in 1977, Steigmann (then a circuit judge) wrote a letter to the Governor's counsel expressing his opposition to Williams' clemency petition. The plaintiffs argue that Justice Steigmann should [**21] have recused himself from this case, or alternatively, that plaintiffs' petition for rehearing should have been granted because of Justice Steigmann's prior knowledge of plaintiff Williams' background.

We reject the plaintiffs' argument. The plaintiffs failed to file a motion or even verbally notify the court at the time of oral argument that they objected to Justice Steigmann's presence on the panel. The plaintiffs did not sound an objection to Justice Steigmann's presence until the petition for rehearing following the release of the appellate court mandate. Therefore, this issue is waived. Additionally, we note that plaintiffs have failed to demonstrate any evidence of bias or prejudice whatsoever on the part of Justice Steigmann other [*557] than conclusory allegations that his participation in the instant civil case approximately 20 years after he had prosecuted one of the plaintiffs in a criminal action was improper. We find, therefore, that the petition for rehearing based upon Justice Steigmann's impartiality in this cause was properly denied.

For the foregoing reasons, we find that there is no genuine issue of material fact as to the plaintiffs' claims alleging State action or violation [**22] of their statutory rights. Therefore, defendants were entitled to summary judgment as a matter of

law. Accordingly, we affirm the judgment of the appellate court.

Affirmed.

DISSENTBY: HARRISON

DISSENT:
JUSTICE HARRISON, dissenting:

A person on leased premises at the invitation of the tenant is exempt from prosecution for criminal trespass to land. (See People v. Flanagan (1985), 133 Ill. App. 3d 1, 5, 88 Ill. Dec. 351, 478 N.E.2d 666; Ill. Rev. Stat. 1991, ch. 38, par. 21-3(c); see also City of Quincy v. Daniels (1993), 246 Ill. App. 3d 792, 795, 186 Ill. Dec. 35, 615 N.E.2d 839; Karow v. Student Inns, Inc. (1976), 43 Ill. App. 3d 878, 883, 2 Ill. Dec. 515, 357 N.E.2d 682.) Contrary to the view taken by the appellate court, this rule is not limited to migrant workers. It applies to any person, whether a migrant worker or otherwise, invited on the land by a tenant. See People v. Flanagan, 133 Ill. App. 3d at 4.

The majority does not take issue with these principles. [**23] Rather, it contends they are inapplicable because the invitations here were invalid. They were invalid, according to the majority, because they violated the provisions of the tenants' leases. Slip op. at 9-10.

Although this contention has superficial appeal, it has no support in the law. No one would dispute that a landlord has the right to place some restrictions on his tenants' right to have guests on the premises. That right, however, is not enforceable through criminal prosecution. If a tenant agrees to the landlord's restrictions [*558] as a condition of the lease, the restrictions have the force of contract, and their violation may place the tenant in breach, subjecting him to eviction. In such a case, the forcible entry and detainer statute (Ill. Rev. Stat. 1991, ch. 110, par. 9-101 et seq.) would provide the sole means for settling the dispute. The criminal trespass law could not be invoked. See People v. Evans (1987), 163 Ill. App. 3d 561, 565, 114 Ill. Dec. 662, 516 N.E.2d 817.

If a tenant cannot be criminally prosecuted for violation of the terms of a lease, I fail to see how we can make the lease

grounds for criminal [**24] prosecution of anyone else. To hold otherwise is tantamount to finding that private parties have the right to alter the criminal law through contractual agreements. This is manifestly impermissible. If a landlord could use lease provisions to restrict what constitutes an "invitation" within the meaning of the law, he would have the power to defeat the very purpose of section 21-3(c) of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38, par. 21-3(c)). The statute would be rendered a nullity.

No matter how strenuously the landlord objected to the presence of the plaintiffs in this case, the fact remains that they were invited by the tenants of the complex to be there. Nothing in the law of criminal trespass gave the landlord the right to nullify that invitation. As a result, the police had no grounds to arrest plaintiffs or to threaten to arrest them for criminal trespass to land.

An individual's right to be free from unlawful arrest and imprisonment unquestionably implicates a liberty interest protected by the Federal Constitution, the violation of which may give rise to a cause of action under 42 U.S.C. § 1983 (1988). (See Motes v. Myers (11th Cir. 1987), 810 F.2d 1055, 1059.) [**25] To recover under that statute, a plaintiff must show that the violation was committed by a defendant acting under color of State [*559] law. (Jones v. Gutschenritter (8th Cir. 1990), 909 F.2d 1208, 1211.) This statutory color-of-State-law requirement is satisfied where the offending conduct meets the State-action requirement of the fourteenth amendment (U.S. Const., amend. XIV). Lugar v. Edmondson Oil Co. (1982), 457 U.S. 922, 935 n.18, 73 L. Ed. 2d 482, 494 n.18, 102 S. Ct. 2744, 2752 n.18.

In concluding that there was no State action here, the majority mistakenly relies on the language of Blum v. Yaretsky (1982), 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777, which involved a due process challenge to the decision of private nursing homes to discharge or transfer Medicaid patients. Although the Supreme Court rejected that challenge, it expressly distinguished the situation from those cases where the defendant is a private party whose conduct has received the imprimatur of the State or where private motives have triggered the enforcement [**26] of State laws by governmental officials who are themselves named as defendants. (Blum, 457 U.S. at 1003-04, 73 L. Ed. 2d at 546, 102 S. Ct. at 2785.) In such cases, the analysis is more

straightforward. To meet the State-action requirement, a plaintiff must show that the person charged with the deprivation is a State official or has acted together with or obtained significant aid from State officials, or that the conduct at issue is otherwise chargeable to the State. Motes, 810 F.2d at 1058.

The majority compounds its error by misapprehending the nature of the offending conduct. The majority focuses on the practice of putting persons' names on a "no trespass" list, but this dispute involves far more than that. The real basis for plaintiffs' challenge is the abuse of the criminal trespass statute to assist the landlords in managing their property.

In the case before us, State officials, namely, the Champaign police, were directly involved in the deprivation [*560] charged by plaintiffs. Although the police may not have formulated the scheme to keep plaintiffs and others off the property, they are the [**27] ones who enforced that scheme by arresting and threatening to arrest persons invited onto the premises by the tenants. As previously noted, such arrests were unlawful. The United States Supreme Court has long held that police officers who act unlawfully in the course of their duties are subject to liability under 42 U.S.C. § 1983. Monroe v. Pape (1961), 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473.

The unlawful arrests and threat of arrests were not sporadic or isolated events. To the contrary, the record indicates that the police and the landlords were engaged in a joint enterprise to systematically rid the premises of those they regarded as undesirable. The landlords decided whom they wanted to exclude, and the police used their arrest powers to exclude them.

Because the landlords were jointly engaged with the police in the unlawful use of the criminal trespass statute, they can be characterized as having acted under color of State law and are subject to liability under 42 U.S.C. § 1983 (1988). (See Lugar, 457 U.S. at 941-42, 73 L. Ed. 2d at 498, 102 S. Ct. at 2756; [**28] Howerton v. Gabica (9th Cir. 1983), 708 F.2d 380, 384-85 (landlords deemed to have acted under color of State law where they repeatedly requested aid by police to effect an eviction, and the police intervened at every step).) The City of Champaign is also subject to liability because the police program to aid the landlords through unlawful use of

the criminal trespass statute can fairly be said, under the record now before us, to represent municipal policy. See Collins v. City of Harker Heights (1992), 503 U.S. , , 117 L. Ed. 2d 261, 270-71, 112 S. Ct. 1061, 1066.

Under established law, plaintiffs have thus advanced a cognizable claim under 42 U.S.C. § 1983 (1988) against [*561] the various defendants named in their amended complaint. By ruling otherwise, the majority eviscerates the statute and gives free reign to private landlords to substitute the coercive power of the police for the civil eviction remedies created by our General Assembly. Until today, the sole recourse for a landlord who disapproved of his tenant's guests was to terminate the tenancy. Now, there [**29] is no longer a need to bother with civil process. The landlord can just call the police and have the tenant's guests hauled away to jail. That the guests may include the father of the tenant's children, or the tenant's son, or some other family member is apparently of no consequence.

Such a result is as offensive as it is unprecedented. As much as we may sympathize with the need of property owners to protect their investments and insure that their tenants have a safe place to live, they have no more of a claim on the authority of the State than do their renters or the friends and relatives of their renters. Under the Federal Constitution it could not be otherwise.

Plaintiffs should be permitted to proceed with their action. I therefore dissent.

JUSTICE FREEMAN joins in this dissent.

III. APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, OPINION

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER, Plaintiffs-Appellants, v. KARL NAGEL and STEVEN W. BARRICK, doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership, doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality, DONALD HANNA, and DON CARTER, Defendants-Appellees.

WILLIAMS v. NAGEL
NO. 4-92-0949
APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT
251 Ill. App. 3d 176; 620 N.E.2d 1376; 1993 Ill. App. LEXIS 1528; 190 Ill. Dec. 115
July 20, 1993, Oral Argument Held
September 30, 1993, Filed

SUBSEQUENT HISTORY: [***1] Released for Publication and Rehearing Denied November 1, 1993.As Corrected October 26, 1993.

PRIOR HISTORY: Appeal from Circuit Court of Champaign County. No. 92L645. Honorable John G. Townsend, Judge Presiding.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiffs-Appellants: Malcolm Barnes, Attorney at Law, Urbana, IL, (Argued by Malcolm Barnes). For Defendants-Appellees: Lorna K. Geiler, Meyer, Capel, Hirschfeld, Muncy, Jahn & Aldeen, P.C., Attorneys at Law, Champaign, IL, (for Nagel and Barrick). Michael R. Cornyn, Thomas, Mamer & Haughey, Attorneys at Law, Champaign, IL, (for City of Champaign and Donald Hanna and Don Carter). (Argued by Lorna K. Geiler and Michael R. Cornyn).

JUDGES: HONORABLE JOHN T. McCULLOUGH, J., HONORABLE ROBERT J. STEIGMANN, P.J., CONCURRING, HONORABLE CARL A. LUND, J., SPECIALLY CONCURRING
OPINIONBY: JOHN T. McCULLOUGH
OPINION: [*177] [**1377] JUSTICE McCULLOUGH delivered the opinion of the court:

Plaintiffs are three individuals who have been barred from entering a housing complex (complex) known as Parkside and Mansard Square Apartments in Champaign. Defendants are the management of the apartments (management), the owner of the complex [***2] (Nagel Group), the City of Champaign (City), and two individual Champaign police officers, Donald Hanna and Don Carter. Plaintiffs' amended complaint sought damages for alleged violations of certain of their common law, statutory and constitutional rights. Defendants' motion for summary judgment was granted and plaintiffs appeal. We affirm.

Plaintiff Lawrence Williams was served with notice that he was being barred from the complex as of September 4, 1991. Plaintiff Mansion Clark was served with notice of being barred from the complex on June 10, 1989. Plaintiff Donald Merriweather was served with notice barring him from the complex as of July 29, 1991.

Plaintiffs Williams and Clark filed their original verified complaint on May 15, 1992, essentially alleging they had invitations to be in the complex and they were prevented from entering the complex, thereby violating certain of their constitutional rights, including [*178] their right to freedom of movement, due process, liberty interest, and the freedom to speak freely and peaceably assemble. Plaintiffs also alleged they were subjected to false imprisonment. Plaintiffs' complaint was accompanied by affidavits.

On May 15, 1992, the court [***3] denied plaintiffs' request for a temporary restraining order (TRO), finding no

specific facts alleged in the verified complaint and the attached affidavits caused it to clearly appear that immediate and irreparable injury would result before notice could be served and a hearing held.

On June 2, 1992, the Nagel Group filed a motion to dismiss pursuant to section 2-619 [**1378] of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1991, ch. 110, par. 2-619). On June 3, 1992, a hearing was held on plaintiffs' petition for a preliminary injunction. The court deferred the hearing on the Nagel Group's motion to dismiss because of insufficient notice and then proceeded with the hearing on the motion for a preliminary injunction. The court heard arguments from counsel, denied the motion for the preliminary injunction, and set a hearing on the motion to dismiss for June 23, 1992.

On June 16, 1992, the Champaign police department (CPD), named as a defendant in the original complaint, filed its motion to dismiss. On June 23, 1992, plaintiffs were granted a continuance and the hearing on the motions to dismiss was vacated and continued. Plaintiffs were granted leave to file an amended complaint, which [***4] they did on July 24, 1992, naming the City instead of the CPD as a defendant.

On August 31, 1992, the Nagel Group filed a motion for summary judgment or in the alternative to dismiss the first-amended complaint. On September 1, 1992, the City and Hanna filed motions to strike, to dismiss, and for summary judgment. Defendant Carter filed his appearance on September 16, 1992, in which he adopted the City's motion for summary judgment or in the alternative to dismiss.

A hearing on the motion for summary judgment was held on October 9, 1992. The trial court granted summary judgment in favor of all defendants and dismissed the case. A written order was filed on October 30, 1992. Plaintiffs filed their notice of appeal purporting to appeal the May 15, 1992, denial of the TRO, the June 23, 1992, denial of the

preliminary injunction, and the October 30, 1992, order granting summary judgment.

As to the denial of the TRO on May 15, 1992, and the denial of the preliminary injunction on June 3, 1992, we hold plaintiffs have lost their right to appeal those two orders.

[*179] If an order is entered which is immediately appealable under Rule 307 (134 Ill. 2d R. 307), then an appeal must be taken or the [***5] right to challenge the ruling is lost. (Robert A. Besner & Co. v. Lit America, Inc. (1991), 214 Ill. App. 3d 619, 626, 574 N.E.2d 703, 707.) A TRO is appealable under Supreme Court Rule 307(d) (134 Ill. 2d R. 307(d)), and an appeal must be filed within two days of the entry of the order sought to be reviewed or the right to challenge the ruling will be lost. (See Baird & Warner, Inc. v. Gary-Wheaton Bank (1984), 122 Ill. App. 3d 136, 138-39, 460 N.E.2d 840, 842; Design Studio International, Inc. v. Chicago Title & Trust Co. (1989), 185 Ill. App. 3d 797, 808, 541 N.E.2d 1166, 1173.) A preliminary injunction may be appealed under Supreme Court Rule 307(a)(1) (134 Ill. 2d R. 307(a)(1)) and the notice of appeal must be filed within 30 days of the entry of the order. We hold the denial of both the TRO and preliminary injunction were appealable under Supreme Court Rule 307. By failing to timely file an appeal from those orders, plaintiffs lost the right to challenge them. The notice of appeal was timely, however, as to the trial court's order granting [***6] summary judgment in favor of defendants.

A motion for summary judgment should be granted when the pleadings, depositions and affidavits reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Ill. Rev. Stat. 1991, ch. 110, par. 2-1005(c); Balla v. Gambro, Inc. (1991), 145 Ill. 2d 492, 508, 584 N.E.2d 104, 112.) The use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit, but it is a drastic means of disposing of litigation and should only be allowed

when the right of the moving party is clear and free from doubt. Purtill v. Hess (1986), 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871.

When the pleadings, depositions and affidavits fail to establish an element of plaintiff's cause of action, summary judgment is proper. (Brunsfeld v. Mineola Hotel & Restaurant, Inc. (1983), 119 Ill. App. 3d 337, 341, 456 N.E.2d 361, 365.) In determining whether the moving [**1379] party is entitled to summary judgment, a court must construe the Pleadings, [***7] depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent. Loyola Academy v. S & S Roof Maintenance, Inc. (1992), 146 Ill. 2d 263, 271-72, 586 N.E.2d 1211, 1215.

Plaintiffs first allege they have common law and statutory rights to be present in the complex because they were invited onto the premises by certain tenants. These rights allegedly stem from [*180] section 21-3(c) of the Criminal Code of 1961 (Criminal Code) (Ill. Rev. Stat. 1991, ch. 38, par. 21-3(c)) and this court's decisions in Karow v. Student Inns, Inc. (1976), 43 Ill. App. 3d 878, 357 N.E.2d 682, and People v. Flanagan (1985), 133 Ill. App. 3d 1, 478 N.E.2d 666.

Section 21-3(c) of the Criminal Code provides, in pertinent part:

"This Section does not apply to any person, whether a migrant worker or otherwise, living on the land with [the] permission of the owner or of his agent having apparent authority to hire workers on such land and assign them living quarters or a place of accommodations for living thereon, nor to anyone living on such [***8] land at the request of, or by occupancy, leasing or other agreement or arrangement with the owner or his agent, nor to anyone invited by such migrant worker or other person so living on such land to visit him at the place he is so living upon the land. (Emphasis added.) (Ill. Rev. Stat. 1991, ch. 38, par. 21-3(c).)

In Flanagan, this court held defendant was exempt from prosecution under the criminal trespass statute because he resided at the house, his mother's, at which he was alleged to have criminally trespassed. Since the evidence established he resided there, he was exempt from prosecution under the criminal trespass statute. Flanagan, 133 Ill. App. 3d at 5, 478 N.E.2d at 668.

In Karow, plaintiff brought an action for false arrest and imprisonment against the operator of a student housing unit and the head resident. A jury verdict was returned in favor of defendants. This court held, among other things, plaintiff could not have been found guilty of criminal trespass since he was present on the property at the express request of a lawful tenant. Karow, 43 Ill. App. 3d at 883, 357 N.E.2d at 687. [***9]

These cases are distinguishable. In Flanagan, defendant was asked to leave by his mother because of a fight over money, but he could not be prosecuted for criminal trespass because he resided at that house. This case offers no support to plaintiffs because they do not reside in the complex. The plaintiff in Karow was asked to leave the housing unit because the operators thought he was committing an offense; however, there were no reasonable grounds for belief that he was in fact committing an offense. The difference between Karow and this case is, although both plaintiff there and plaintiffs here had been invited onto the property, plaintiff in Karow had not been barred from the premises.

[*181] Plaintiffs' presentation of evidence by tenants that they were invited onto the premises has little merit. The tenants are not plaintiffs in this proceeding. Additionally, the lease agreement with tenants provided management had the right "to bar individuals from the property."

Section 21-3(a) of the Criminal Code provides that if a person enters the land or a building of another after receiving,

prior to such entry, notice from the owner or occupant that such entry is forbidden, [***10] the person entering the land is subject to criminal trespass. (Ill. Rev. Stat. 1991, ch. 38, par. 21-3(a).) Plaintiffs have all been served with notice that if they attempt to enter the complex, they will be subject to arrest for criminal trespass. The exception found in subsection (c) regarding the provisions of subsection (a) not applying if the person attempting to enter the property has been invited by a resident of that property cannot be used to nullify the provisions of [**1380] section (a). Otherwise, if every time a person was prohibited from entering certain property, residents or tenants of that property claimed they had invited that person onto the property, the exception found in subsection (c) would eliminate the offense of criminal trespass found in subsection (a).

Both parties referred at oral argument to our recent decision in City of Quincy v. Daniels (June 17, 1993, 4th Dist. Gen. No. 4-92-0980), 246 Ill. App. 3d 792, 615 N.E.2d 839 . In City of Quincy, defendant was found guilty of trespass under section 31.138 of the Municipal Code of the City of Quincy. (Quincy, Ill., Municipal Code @ 31.138 (1980).) This court reversed defendant's conviction, finding [***11] that since defendant was occupying the apartment at the express invitation of the leaseholder, the only relevant question was the validity of the lease. This question must be answered by the application of the principles of landlord-tenant law and the Forcible Entry and Detainer Act (Ill. Rev. Stat. 1991, ch. 110, par. 9-101 et seq.) rather than the principles of criminal law. City of Quincy (June 17, 1993, 4th Dist. Gen. No. 4-92-0980, slip op. at 8-9), Ill. App. at , N.E.2d at .

We find our decision in City of Quincy distinguishable. First, that case involved a criminal matter involving a municipal ordinance while that presented here is a civil case involving constitutional rights. Moreover, that case involved a single unit while the dwelling in question here is a multiunit apartment complex. Finally, we note that the discussion of section 21-3(c) of the Criminal Code and the public policy of

this State that criminal trespass may not be charged against invited guests on leased property is merely dicta incidental to that opinion and not binding on us in this decision. The holding of that case was that possessory interests in a leasehold [*182] cannot [***12] be determined by principles of criminal law. We note that in City of Quincy, defendant had in fact been issued a citation for criminal trespass. Section 21-3(c) of the Criminal Code was intended by the legislature to address the plight of migrant workers or persons similarly situated; that subsection has nothing to do with the circumstances of this case and constitutes no defense to the charge of criminal trespass to land except in the limited circumstances involving migrant workers. Section 21-3(c) of the Criminal Code does not apply to this case. The exception found in that subsection does not nullify the provisions of section 21-3(a) of the Criminal Code. To the extent City of Quincy is not distinguishable, its statements with respect to section 21-3(c) of the Criminal Code and the public policy of this State are not to be used as precedent.

Having determined plaintiffs have no common law or statutory right to enter the complex, the only remaining issue is whether their constitutional rights have been violated by being barred from the complex. Plaintiffs' argument can essentially be summarized as follows. Individuals are served with notice that they have been barred from [***13] the complex. On occasion, the CPD serves this notice. Some, but not all, persons who are barred are placed on a "no trespass" list. If a person on the "no trespass" list attempts to enter the complex, he or she could be arrested for criminal trespass. The CPD decides who is to be placed upon the "no trespass" list. This, plaintiffs argue, is the necessary State action" to validate their claims of the violation of their constitutional rights.

For an action to rise to the level of "State action" triggering constitutional protection, there must be a sufficiently close nexus between the State and the action, so that the action may be fairly treated as that of the State. The State is

"significantly involved" only when it has commanded a particular result or reserved to itself the power to determine that result. Mere acquiescence to a private action by the State does not convert it to State action. (In re Marriage of Braundmeier (1990), 201 Ill. App. 3d 14, 17, 558 N.E.2d 805, 806-07.) In cases where a defendant is a private party, the question is whether the conduct has sufficiently received the imprimatur of the State so as to make it "State" [***14] action for purposes of the fourteenth amendment. To determine whether certain conduct of a defendant is "State action," a complaining party may show that there is a sufficiently [**1381] close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be treated as that of the State itself. The purpose of this requirement is to assure that constitutional standards are involved [*183] only when it can be said that the State is responsible for the specific conduct of which the plaintiffs complain. Blum v. Yaretsky (1982), 457 U.S. 991, 1003-05, 73 L. Ed. 2d 534, 546-47, 102 S. Ct. 2777, 2785-86.

Plaintiffs alleged the CPD's practice of recommending who is to be placed on the "no trespass" list creates a sufficiently close nexus between the actions of the CPD and the Nagel Group such as to make the actions of the Nagel Group those of the City. Paragraph 11 of plaintiffs' complaint, which is incorporated by reference into the counts seeking injunctive relief and damages, alleges:

"That commencing around July, 1991[,] and continuing to present, the CHAMPAIGN POLICE DEPARTMENT, on information [***15] and belief, at the instigation and direction of the Defendants, DONALD HANNA and DON CARTER, instituted a custom, policy, or practice, acquiesced or approved by and jointly executed by all other Defendants, whereby the CHAMPAIGN POLICE DEPARTMENT, because intimately involved in and controlled virtually all aspects of the barring of the named plaintiffs herein and others, as an example, per exhibit 'H', attached and

incorporated herein, to include but not be limited to the following chilling conduct:

A. Deciding who was to be barred and/or who was to remain being barred and adding numerous other to the list of persons barred from the premises of PARKSIDE AND MANSARD SQUARE APARTMENTS, often directing security personnel to place certain individuals on the list.

B. Actually both deciding who was to be barred and serving barring notices on behalf of the other named Defendants in numerous instances, as an example per exhibit 'I', attached hereto and incorporated herein and being a notice barring the Plaintiff, DONALD F. MERRIWEATHER served by Officers Ron Durbin and John Schweihart, officers of the CHAMPAIGN POLICE DEPARTMENT.

C. Directing or virtually directing a policy change in the [***16] security arrangements at PARKSIDE AND MANSARD SQUARE APARTMENTS from one of first asking alleged trespassers on the barred list to please leave, secondly, warning the alleged trespasser to leave and lastly, actually calling the police to arrest the alleged trespasser to one of the calling the police immediately to arrest the alleged trespasser."

Plaintiffs contend this conduct by the CPD, Hanna and Carter violated their constitutional rights under the first, fifth, and fourteenth [*184] amendments to the United States Constitution. (U.S. Const., amends. I, V, XIV.) Plaintiffs allege the Nagel Group approved, acquiesced in, and allowed the CPD, Hanna and Carter to become so "intimately involved in the security arrangements and barring practices, such that the conduct can be described as State action."

Patricia Jeffers has three affidavits on file dated June 2, 1992, August 28, 1992, and October 6, 1992. In each, she stated she is vice-president of property management of Nagel Group, Inc. She stated officers of the CPD have served barred

notices to individuals, but that the management of Parkside and Mansard Square Apartments has complete and total discretion as to whom should be placed [***17] on the "no trespass" list. The CPD has given management notice that individuals have been served with notice that they are barred, and management does consider reports and records from the CPD, the county police and Urbana police department. However, not all individuals recommended by the CPD have been placed on the "no trespass" list.

In his affidavit of October 1, 1992, Mark S. Hamilton stated in paragraph four that a policy change by the management in July 1991 occurred in which it authorized the CPD to place persons on a list barring them from entering the complex. He tape-recorded a meeting between himself, members [**1382] of the CPD and the management which "jogged his memory to recall on information and belief" that the CPD had previously been supplied with a stack of blank forms from the management to prepare and use in barring individuals, with the CPD filling out the forms, serving them and providing copies to the management. Exhibit "A" attached to Hamilton's affidavit appears to be a set of regulations for security. Paragraph two contains the sentence, "A person can be BARRED by SECUITY [sic]--POLICE--PARKESIDE [sic] and MANSARD EMPLOYEES."

Hamilton stated in his affidavit of [***18] October 5, 1992, that he was the manager of E.L. Enforcement Service, Inc., of Belleville, Illinois, which provided security services to Parkside and Mansard Square Apartments between October 1990 and February 1992. To the best of his knowledge, no one was able to place an individual on the "no trespass" list except the employees of Parkside and Mansard Square Apartments. If an individual was served with a barred notice but not put on the "no trespass" list, security would not call the police to arrest the individual for criminal trespass if he was at the complex. Hamilton stated that there was a difference between being served a notice of barred and being on the "no trespass" list.

[*185] Elizabeth Nicholson stated in her affidavit of October 6, 1992, that she has been a management representative of Parkside and Mansard Square Apartments since 1989. She stated exhibit "A" to Hamilton's affidavit is a document prepared by Aaron Shriver, the site superintendent for Yale Enforcement Service, Inc., which was prepared at her request for use in a newsletter to the residents of the complex. She did not request Shriver to prepare paragraphs one through three and five through eight of Hamilton's [***19] affidavit. She stated Exhibit "A" was never distributed to the residents of the complex. Exhibit "A" was never used in any newsletter to the residents of the complex.

The final two affidavits on file are those of Hanna and Carter, the individual CPD officers named in this lawsuit. Manna stated in his affidavit that at the time relevant to the complaint he was the chief of police for the City. There was no policy, custom or practice of the police department to bar persons from entering any private property, including the premises of the Parkside and Mansard Square Apartments. If persons were barred from private property by the owners, the police department would enforce the trespass laws. Hanna stated the decision to bar people was not made by the police department or through any policy of the police department, and as chief of police he was not authorized by the Champaign city council to bar persons from private property or to make any policy by which police officers would make the decision to bar persons from private property. He neither made such a policy nor concurred or acquiesced in such a custom or policy. The policy of the police department was to enforce the law, not to make [***20] decisions for private property owners.

Carter stated in his affidavit that he was now acting chief of police for the City, and at the times relevant to the complaint, he was deputy chief of the CPD. There was no policy within

the CPD to bar persons from the premises of Parkside and Mansard Square Apartments. There is a policy of the CPD to enforce the trespass laws. He stated the police department did not make the decision to place the plaintiffs on the "no trespass" list. He also stated that Merriweather has been barred from the property by order of Judge Parkinson in criminal case No. 91-CM-1513. His affidavit indicates the police department had been in meetings with citizen tenant groups and others regarding the problems of recurrent crime in the complex, as well as the means and methods which might bring a greater degree of safety and security to the residents. The management of the complex attended these meetings. However, he [*186] stated in his affidavit that the police cannot bar persons from private property; that was a decision to be made by the property owner. The police have arrested persons for trespass if they have been barred from the property and have on occasion served the [***21] notice of being barred upon [**1383] the individual. He also admitted that the police officers occasionally provide information, advice or recommendations to property owners concerning individuals who have been involved in criminal activity and this advice is sometimes taken and used by the owner to decide whom to bar, but sometimes the advice is not followed and the individual is not barred.

In conclusion, plaintiffs have presented no facts to show a sufficiently close nexus between the conduct of the CPD and the Nagel Group in barring individuals from the complex. The conduct of the Nagel Group cannot be fairly treated as that of the CPD to establish the necessary State action.

At best, the Nagel Group and the management use the CPD to serve the barred notices to certain individuals. The police department is better equipped to serve people with such notices because they are able to find people more easily and actually deliver the notice. While this in and of itself may be State action, the serving of notice is not enough to establish plaintiffs' right to bring this action. Moreover, the Nagel Group may have relied upon recommendations from the CPD

as to whom to place on the "no trespass" list [***22] or whom to bar, but the Nagel Group did not always follow those recommendations.

The affidavits submitted by the CPD and the management representatives indicate that the final decision as to who was to be placed on the "no trespass" list was up to the management rather than the police department. The most contradictory evidence to that assertion is exhibit "A" to Hamilton's affidavit, which contains the sentence that the CPD had the authority to bar people. However, this was countered by the affidavit of Elizabeth Nicholson, who had exhibit "A" prepared. She explained the purpose of that exhibit and asserted that the statement in Hamilton's affidavit was inaccurate. Also, as Hamilton explained, there is a difference between being barred and being placed on the "no trespass" list. A person could be barred from the complex but not placed on the "no trespass" list and therefore not subject to arrest if found at the complex. Thus, taken in the light most favorable to plaintiffs, the sentence in exhibit "A" could indicate that the CPD could determine who would be barred, but not determine who would be placed [*187] on the "no trespass" list, the latter being that which subjects the person [***23] to the criminal prosecution for violation.

Therefore, there is no genuine issue as to any material fact because plaintiffs have not alleged State action sufficient to sustain a cause of action for a deprivation of constitutional rights. Because there is no State action, the trial court properly granted summary judgment in favor of management and the Nagel Group. Moreover, plaintiffs failed to show an unconstitutional policy of placing individuals on the "no trespass" list; accordingly, the trial court also properly granted summary judgment in favor of the City, Hanna and Carter.

For the foregoing reasons, the judgment of the circuit court of Champaign County is affirmed.

Affirmed.

STEIGMANN, P.J., concurs.
LUND, J., specially concurs.
CONCURBY: CARL A. LUND

CONCUR: JUSTICE LUND, specially concurring:

City of Quincy rests on facts clearly different than here. In City of Quincy, a mother moved in with her son, a possible violation of the lease agreement, but hardly a trespasser. The use of trespass in City of Quincy was nothing other than an attempt to avoid the Forcible Entry and Detainer Act. Under the facts in City of Quincy, it is folly to uphold criminal actions. The present case [***24] is based upon entirely different facts--prior notice of limitation being quite significant!

IV. ORDER STAYING MANDATE, ILLINOIS SUPREME COURT

No. 76442
IN THE
SUPREME COURT OF ILLINOIS

Williams et al,. Leave to	)	Petition for
	)	Appeal from the Fourth
Plaintiffs-Appellants	)	District Appellate Court
	)	4-92-0949
vs.	)	
	)	In the Circuit Court
Nagel et al.,	)	of the Sixth Judicial
Defendants-Appellees	)	Circuit, Champaign,
	)	Illinois
		No. 92-L-645

ORDER

This matter has come for consideration upon the motion of *Plaintiffs* to stay the mandate of this Court pending appeal or application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which said application or notice may be filed. If certiorari is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the Clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of time within which appeal or certiorari may be sought.

12/13/94 (signed) *Benjamin K. Miller*

FILED
DEC 13 1994
SUPREME COURT CLERK

V. ORDER DENYING PETITION FOR REHEARING, ILLINOIS SUPREME COURT

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
December 5, 1994

Mr. Malcolm Barnes
Attorney at Law
709 S. Race St..
Urbana, Illinois 61801

No. 76442 - Lawrence A. Williams et al., appellants, v. Karl Nagel et al. , etc., appellees. Appeal, Appellate Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 15, 1994.

VI. ORDER DENYING PETITION FOR REHEARING, APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE: 11/01/93

RE: Williams et al. v. Nagel et al.
General No.: 4-92-0949
Champaign 92L645

TO COUNSEL:

The court today denied the petition for rehearing and petition to vacate opinion for a new panel in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

VII WRITTEN ORDER BY TRIAL COURT ON SUMMARY JUDGMENT

IN THE CIRCUIT COURT THE SIXTH JUDICIAL CIRCUIT, CHAMPAIGN COUNTY, ILLINOIS

LAWRENCE A. WILLIAMS,)
MANSION W. CLARK, and)
DONALD F. MERRIWEATHER,)
Plaintiffs. VS.)No. 92-L-645
KARL NAGEL and STEVEN W.)JURY
BARRICK doing business as CHAMPAIGN)DEMAND
HOUSING ASSOCIATES, a partnership)
doing business as PARKSIDE AND)
MANSARD SQUARE APARTMENTS;)
STEVEN W. BARRICK AND;)
ASSOCIATES THE NAGEL GROUP,)
INC. an Illinois Corporation; and)
THE CITY OF CHAMPAIGN, a)
Municipality, DONALD HANNA and)
DON CARTER,)
Defendants.

ORDER

CAUSE COMING on Motions for Summary Judgment and Motions to Strike and Dismiss filed by all Defendants, issues having been briefed and oral arguments on the issues having been heard, the Court is fully apprised of the issues having considered the testimony presented during the hearing on preliminary injunction, the exhibits filed by all the parties, the memoranda of law and the oral arguments of all the parties, the court finds that there are no issues of material fact that would preclude it from entering judgment in the case. The Court therefore finds in favor of the Defendants on their Motion for Summary Judgment and against the Plaintiffs. All other motions are moot and therefore denied. Summary judgment is entered in favor of all Defendants and against the Plaintiffs. Costs are awarded to the Defendants.

ENTERED: This *30* day of October, 1992.

(signed)
CIRCUIT COURT JUDGE (R. 254)

VIII. PETITION FOR REHEARING, ILLINOIS SUPREME COURT

PETITION FOR REHEARING

I. THE RULING THAT STATUTORY, CRIMINAL TRESPASS EXEMPTION IS UNAVAILABLE AS A MATTER OF LAW TO INVITEES OF INVITOR-TENANTS WITH LEASES EMPOWERING LANDLORD-OWNERS TOTAL AUTHORITY TO BAN ANYONE FROM TENANT LEASEHOLDS DISREGARDS DUE PROCESS.

Most important in this regard would be to carefully note that none of the Plaintiff-invitees herein are privy to any of the leases their tenant-invitors may have with the Defendant landlord-owner. Of course, all have notice of the Criminal Code trespass provisions, Texaco, Inc vs. Short,454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982) that plainly inform them of two things: 1. They can be given notice from an owner that entry on the premises is prohibitted, after which they can be arrested and criminally prosecuted for trespass; 2. But if they are invitees of tenants, not to worry, the trespass law "does not apply", 21-3 (a) and (c), 720 ILCS.

Plaintiffs have no quarrel that of course, they must have valid invitations in fact from their tenant invitees. Obviously, coerced or fraudulently obtained invitations are tainted. But now, the Court has ruled ab initio that invitations may be invalid as a matter of law if landlord-owners have lease reservations with tenant-invitors, such as herein: "Management has the right to bar individuals from the property". Not being privy to any leases herein, Plaintiffs have absolutely no clue whatsoever that their invitations may be invalid as a matter of law. They certainly don't get any if they read section 21-3(c) that does not at all say, : "(t)his Section does not apply...to anyone invited by...(a tenant)...to visit him at the place he is...living...except where the owner

reserves a provision in the lease agreement that he has the right to bar individuals from the property and give the notice as specified in subsection a". Since sections 21-3(a) and (c) are criminal statutes, the landmark decision of Lanzetta vs. New Jersey, 306 U. S. 451, 56 S. Ct. 618, 83 L. Ed. 2d 888 at 890 (1939) especially applies:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. CT. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Sections 21-3(a) and (c), in not at all saying what the instant opinion ab initio says as a matter of law it really means, are now, as newly interpreted, in obvious, clear violation of the foregoing "first essential of due process of law".

In addition to no criminal code, statutory clue being given to the non-privied, Plaintiff-invitees that their invitations may be invalid as a matter of law as a result of a landlord-owner's lease, there is absolutely nothing in the Record on Appeal that they had any notice of any sort of any lease provisions, let alone any notice that would come close to Constitutional standards, see, e.g. Greene vs. Lindsey, 456

U. S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982)(Notice of eviction posted on apartment door insufficient).

II. THE AB INITIO RULING NOW MOST ASSUREDLY PLACES THIS CASE ON THE LUGAR VS. EDMONDSON OIL CO LEVEL OF STATE ACTION.

The ruling creates a new procedural scheme to the law of criminal trespass, noted above to be in violation of fundamental due process. In Lugar vs. Edmondson Oil Company, 457 U. S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), "...pursuant to state law, Edmondson sought prejudgement attachment of certain of...(Lugar's)...property...The prejudgement attachment procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered..(Lugar's)...property." 73 L. Ed. 2d at 487 (citation omitted). Similarly, the new procedural scheme now works like this for all landlords in Illinois who, before the ruling herein, had no power to forbid valid in fact invitations of their tenants: They obtain a lease reservation or slip in a rule governing tenants warranting their authority to ban whomever from the tenants' leasehold on whatever pretext, or no pretext whatsoever, then, even swifter than the ex parte petition procedure Edmondson had to undergo to sequester only property, they merely dial 911, or, with even greater ease, update the list over at the police station ("If we see a guy who is on the banned list, we trash him, we don't tell him anything, we just tell him he's under arrest." Officer Luecking, C212) to have an invitee, now an "offender", arrested (a "seizure") to face criminal prosecution for trespass. This is precisely "...private use of...challenged state procedures with the help of state officials...(which)...constitutes state action for purposes of the Fourteenth Amendment. " id at 493. The Court notes:

"While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well." id at 498 (emphasis added).

That second element was met in Lugar because "...when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute...", id ,"...(w)e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." Plaintiff Williams, not privy to any lease, is invited by tenant Lorraine Cowart to visit her and their child at her apartment. The landlord bars him from the premises. Unknown to him, because of a provision in a private document, as opposed to a validly enacted, constitutionally sound criminal statute, there is a lease clause or tenant rule that empowers the private landlord to bar anyone at will from tenant Cowart's apartment. The private landlord now has the power to have him seized by the police and criminally prosecuted for trespass, clearly an ex parte application of the first magnitude for the seizure of his person based on a constitutionally flawed scheme that "...violates the first essential of due process of law." Lanzetta vs. New Jersey, supra, 83 L. Ed. at 890, (greater state action than the Seriff's deputy just standing by watching an illegal eviction in Soldal vs. Cook County, 121 L. Ed.2d 450(1992)). The private landlord now becomes a joint participant with the State in this scheme, now becomes a state actor, much more so in this case where the basis for Plaintiff Williams banishment is a "recommendation" by the defendant City's police department based on unspecified police reports. To this day, Plaintiff Williams has no idea what those police reports might be. All he knows is that what he thought was a private battle with the

landlord, what he thought was finally, privately and informally resolved, suddenly was reversed by executive decision, not judicial, with the full force of executive arrest power to back it up.

> "Although the private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action...our cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials" Edmonson vs. Leesville Concrete Co ,500 U. S. _, 111 S. Ct. _, 114 L. Ed. 2d 660 at 674 (1991)(relying on Lugar).

This language most convincingly applies to this case, where we now have the private use by private landlords of the State of Illinois' criminal trespass laws, public remedies, to enforce private lease provisions Plaintiff-invitees are not privy to.

III. SHOULD THE COURT ALLOW THE MOTION TO SUPPLEMENT THE RECORD ON APPEAL, THE LETTER OF THE DEFENDANT CITY'S LEGAL DEPARTMENT MOST PERSUASIVELY SHOWS THE STATE ACTION IN THIS CASE.

Written well after the commencement of this litigation, the letter is attached to the affidavit and motion, all of which is attached to this Petition, given the time constraints on the due date of this Petition and given the most recent disclosure of it to counsel after the Court rendered its opinion. Plaintiff's respectfully request the Court's consideration of them and incorporate them herein: The argument in the motion is sufficient and the letter speaks for itself in further delineating the police relationship with the landlord in this case.

IV. FACTS WERE OVERLOOKED OR MISAPPREHENDED.

Plaintiffs are puzzled in that no mention of the lengthy tape recording between management, security and the police was referred to in the opinion, the transcript appearing in the Common Law Record at pages 202 through 234. Certainly, at summary judgement stage, the inferences are clearly there, with no ifs, ands or buts about it as to police involvement with the landlord defendants herein, contrary to the opinion's assertion that Plaintiffs presented only one item on the issue, the policy statement. With all due respect to the Court, Plaintiffs submit that the state action issue should be submitted to a jury in this case: The plaintiffs have the evidence to present, it's there.

CONCLUSION: As important as the apt observation that this case is about the abuse of the trespass laws are Plaintiffs' concerns that the current milieu of crime in American society will result in executive response that pays little if no heed to most cherished, fundamental freedoms, those evident in this case: Our right to associate with whomever we choose, whenever and in our own homes, if we want, without governmental interference through some subterfuge with the landlord; And if the executive chooses to deny that right by forbidding it on pain of arrest and jail, the basic premise of our State and Federal Bills of Rights mandates rigorous judicial scrutiny before the denial is enforced, not at all an executive regard in this case and the reason this lawsuit was filed, post facto.

WHEREFORE, the Plaintiff-Appellants, LAWRENCE A WILLIAMS, MANSION W. CLARK and DONALD F. MERIWEATHER respectfully pray for an order allowing this Petition for Rehearing.

_____

Malcolm Barnes for Appellants

(Illinois Supreme Court denied motion to supplement; attachment not include here)

IX. COUNTS I THROUGH III, FIRST AMENDED COMPLAINT

IN THE CIRCUIT COURT THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

LAWRENCE A. WILLIAMS,	)
MANSION W. CLARK, and	)
DONALD F. MERRIWEATHER,	)
Plaintiffs,	)
vs.	)No. 92-L-645
KARL NAGEL and STEVEN W.	)JURY
BARRICK doing business as CHAMPAIGN	)DEMAND
HOUSING ASSOCIATES, a partnership	)
doing business as PARKSIDE AND	)
MANSARD SQUARE APARTMENTS;	)
STEVEN W. BARRICK AND;	)
ASSOCIATES THE NAGEL GROUP,	)
INC. an Illinois Corporation;	)
and THE CITY OF CHAMPAIGN, a	)
Municipality, DONALD HANNA and	)
DON CARTER,	)
Defendants.	

FIRST AMENDED COMPLAINT

Now comes the Plaintiffs, LAWRENCE A. WILLIAMS, MANSION CLARK and DONALD T. MERIWEATHER, by their attorneys, Malcolm Barnes and Harvey C. Welch as co-counsel and for their Complaint against the Defendants, KARL NAGEL and STEVEN W. BARRICK, doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS, STEVEN W. BARRICK AND ASSOCIATES, THE NAGEL GROUP,

INC and THE CITY OF CHAMPAIGN, a Municipality, DONALD HANNA and DON CARTER, they state the following:

COUNT I, WILLIAMS, INJUNCTION

For Count I of this Complaint, the Plaintiff, LAWRENCE A. WILLIAMS, states the following:

1. That at all times mentioned in this Complaint, the Defendants, KARL NAGEL and STEVEN W. BARRICK, residents of Illinois, were and may still be doing business as a partnership known as CHAMPAIGN HOUSING ASSOCIATES owning and leasing approximately 170 apartments heavily subsidized and regulated by the U.S. Department of Housing and Urban Development and known as PARKSIDE AND MANSARD SQUARE APARTMENTS located in the City of Champaign, County of Champaign and State of Illinois.

2. That at all times mentioned in this Complaint, the Defendant, STEVEN W. BARRICK AND ASSOCIATES was and still may be an Illinois management firm which managed and still may manage all aspects of the leasing arrangements for CHAMPAIGN HOUSING ASSOCIATES operating the PARKSIDE AND MANSARD SQUARE APARTMENTS, and acted as agents for the Defendants KARL NAGEL and STEVEN W. BARRICK and that all actions complained of herein were done within the scope and authority of that agency.

3. That on information and belief, sometime in early 1992, ownership of the aforesaid PARKSIDE AND MANSARD SQUARE APARTMENTS was transferred to the Defendant, THE NAGEL GROUP, INC. which is an Illinois Corporation doing business in Illinois and which now manages all aspects of PARKSIDE AND MANSARD SQUARE APARTMENTS and doing business as CHAMPAIGN HOUSING ASSOCIATES.

4. That at all times mentioned in this Complaint, the Defendant, CITY OF CHAMPAIGN, an Illinois Municipality located in Champaign County operated a police agency known as the CHAMPAIGN POLICE DEPARTMENT, hereinafter referred to as the

CHAMPAIGN POLICE DEPARTMENT, and is liable for its conduct.

5. That at all times mentioned in this Complaint, the Defendant, DONALD HANNA, was the Chief of Police of and in charge of the CHAMPAIGN POLICE DEPARTMENT.

6. That at all times mentioned in this complaint, the Defendant, DON CARTER, was the Deputy Police Chief of and also in charge of CHAMPAIGN POLICE DEPARTMENT.

7. That at all times mentioned in this Complaint and at the present time, the Plaintiff, a resident of Champaign, Illinois, had and still has invitations to visit Lorraine Cowart, Rosie L. Ashe and others who are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS, to include his children who reside or have resided with Lorraine Cowart and Rosie L. Ashe, other relatives and other close friends who invite him and reside at PARKSIDE AND MANSARD SQUARE APARTMENTS.

8. That notwithstanding the said invitations, PARKSIDE AND MANSARD SQUARE APARTMENTS, since before October 2, 1989 have notified the Plaintiff on various occasions that he was barred from the premises on pain of imminent arrest for trespassing, as per exhibits "A", "B", "C", "D" and "E", attached hereto and incorporated herein, the latest notice being exhibit "A", dated 9/4/91 and being on the "recommendation" of the CHAMPAIGN POLICE DEPARTMENT, a totally arbitrary action, all without affording Plaintiff a hearing.

9. That notwithstanding the said invitations, the CHAMPAIGN POLICE DEPARTMENT, has arrested the Plaintiff for trespass on four separate occasions, October 2, 1989 (89-Q-1282), October 16, 1989 (89-CM-1604), October 16, 1989 (no charges filed) and on July 20, 1991 (91-CM-1404), none of the arrests resulting in any convictions for trespass.

10. That the Plaintiff desires to visit Lorraine Cowart, Rosie L. Ashe, his children, other relatives and close friends at their residences at PARKSIDE AND MANSARD

SQUARE APARTMENTS on their invitations but fears imminent arrest by the CHAMPAIGN POLICE DEPARTMENT if he does so.

11. That commencing around July, 1991 and continuing to present, the CHAMPAIGN POLICE DEPARTMENT, on information and belief, at the instigation and direction of the Defendants, DONALD HANNA and DON CARTER, instituted a custom, policy, or practice, acquiesced in or (sic) approved by and jointly executed by all other Defendants, whereby the CHAMPAIGN POLICE DEPARTMENT, became (sic) intimately involved in and controlled virtually all aspects of the barring of the named Plaintiffs herein and others, as an example, per exhibit "H", attached and incorporated herein, to include but not be limited to the following chilling conduct:

A. Deciding who was to be barred and or who was to remain being barred and adding numerous others (sic) to the list of persons barred from the premises of PARKSIDE AND MANSARD SQUARE APARTMENTS, often directing security personnel to place certain individuals on the list.

B. Actually both deciding who was to be barred and serving barring notices on behalf of the other named Defendants in numerous instances, as an example, per Exhibit "I", attached hereto and incorporated herein and being a notice barring the Plaintiff, DONALD F. MERRIWEATHER served by Officers Ron Durbin and John Schweihart, officers of the CHAMPAIGN POLICE DEPARTMENT.

C. Directing or virtually directing a policy change in the security arrangements at PARKSIDE AND MANSARD SQUARE APARTMENTS from on of first asking alleged trespassers to please leave, secondly, warning the alleged trespassers on the barred list to leave and lastly, actually calling the police to arrest the alleged trespasser to one of calling the police immediately to arrest the alleged trespasser.

12. That the Plaintiff is afforded one or more of the following legal rights at any time to visit Lorraine

Cowart, Rosie L. Ashe, his children or other relatives or close friends who are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS who invite him to their residences without pain of arrest.

A. That while Section 21-3(a) Ch. 38, 1989 Ill. Rev. Stats. forbids criminal trespass to real property, Section 21-3(c) clearly states that Section 21-3(a)...."does not apply...to anyone living on...(the)...land at the request of, or by occupancy, leasing or other agreement or arrangement with the owner or (sic) his agent, nor to anyone invited by such...other person so living on such land to visit him at the place where he is so living upon the land..." (emphasis added).

B. That arbitrarily "barring" the Plaintiff from the premises and subjecting him to arbitrary, trespass arrest violates his due process liberty interest, his Constitutional right to freedom of movement afforded to him by the Fifth Amendment to the United States Constitution and to Section 2 of Article II of the Constitution of the State of Illinois. Kent vs. Dulles, 367 U.S. 116, 2 L. Ed.2d 1204, 78 S. Ct. 1114 (1958); Aptheker vs. Secretary of State, 378 U.S. 500, 12 L. Ed.2d 992, 84 S. Ct. 1659; see Kolender vs. Lawson, 461 U.S. 352, 75 L. Ed.2d 903, 103 S. Ct. 1855 (1983); Morris vs. Faulkner, 46 Ill. App.3d 625, 361 N.E.2d 112, 5 Ill. Dec. 112 (5th Dist., 1977).

C. That arbitrarily "barring" the Plaintiff from the premises and subjecting him to arbitrary, trespass arrest violates his Constitutionally protected right of freedom of association, that is, to enter into and maintain certain intimate relationships and peaceably assemble with others who invite him, a fundamental element of personal liberty, as is afforded to him in the First Amendment to the Constitution and in Section 4 and 5 of the Constitution of the State of Illinois: "...(P)eaceable assembly for lawful discussion cannot be made a crime." De Jonge vs. Oregon, 299 U.S. 353, 157 S. Ct. 255, 81 L Ed. 278 at 284 (1937) (emphasis added) (sic); Aptheker vs. Secretary of State, supra, Dallas vs. Stanglin, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed.2d 18 (1989); Board of Directors of Rotary International vs. Rotary Club, 481

U.S. 537, 107 S. Ct. 1940, 97 L. Ed.2d 474 (1987); Moore vs. City of East Cleveland, 431 U.S. 484, 52 L. Ed.2d 531, 97 S. Ct. 1932 (1977): People vs. Chambers, 32 Ill. App.3d 444, 335 N.E.2d 612 (2d Dist., 1975).

D. That arbitrarily "barring" the Plaintiff from the premises and subjecting him to arbitrary, trespass arrest without first affording him a hearing violates due process rights afforded by both the United States Constitution and the Constitution of the State of Illinois, the Fifth and Fourteenth Amendments and to Section 2 respectively, with the practice of wholesale listing of persons "barred" from the premises examples per exhibits "G" and "H", attached hereto and incorporated herein, without affording them hearings being in gross violation of their due process rights.

E. That arbitrarily "barring" the Plaintiff from the premises and subjecting him to arbitrary trespass arrest falsely imprisons him; "...false imprisonment consists of unlawful restraint, against his will of an individual's personal liberty or freedom of locomotion." Karow vs. Student Inns 43 Ill. App.3d 878, 357 N.E.2d 682, 2 Ill. Dec. 515, 519 (4th Dist., 1976) (citation omitted) (sic); "In Civil Law, a person on the leased premises at the express invitation of the tenant is not a trespasser" id at 2 I. D. 520, (citation omitted).

F. That arbitrarily "barring" the Plaintiff from the premises and subjecting him to arbitrary trespass arrest is an unlawful restraint upon his "right of liberty,...freedom of locomotion, the right to come and go or stay, when or where...(he)...may choose. Such a right is fundamental and is entitled to the protection of the law so that an action will lie for an unlawful restraint thereof." Morris vs. Faulkner, 46 Ill. App.3d 625, 361 N.E.2d 112, 5 Ill. Dec. 112, 115 (5th Dist., 1977).

13. That each of the named Defendants are in violation or have been in violation of Section 1983 of Chapter 42 of the United States Code in that their aforesaid conduct in prohibiting the Plaintiff from visiting his invitors at their residences at PARKSIDE AND MANSARD SQUARE APARTMENTS has subjected him to a deprivation of his aforesaid federal constitutional rights and

privileges, these being, his rights to freedom of movement, association and due process, with all defendants acting under "color of state law":

A. That the Defendant, City of Champaign, as a municipality of the State of Illinois operating the CHAMPAIGN POLICE DEPARTMENT, is liable for the constitutional deprivations subjected on the Plaintiff and imposed on him pursuant to the aforesaid governmental custom, policy or practice whether written or unwritten, Monell vs. N.Y. Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978) and is also liable for the aforesaid misconduct of its employees, the individual Defendants, DONALD HANNA and DON CARTER pursuant to 42 U.S.C. 1983 (sic); that the aforesaid individuals are "persons" under Section 1983 and are separately liable to the Plaintiff for their conduct in instituting the aforesaid governmental custom, policy or practice.

B. That the other Defendants, KARL NAGEL, STEVEN W. BARRICK, CHAMPAIGN HOUSING ASSOCIATES, and THE NAGEL GROUP, INC., as owners and managers of PARKSIDE AND MANSARD SQUARE APARTMENTS, in approving, acquiescing in and jointly executing the aforesaid custom, policy and practice of the CHAMPAIGN POLICE DEPARTMENT and the Defendants DONALD HANNA and DON CARTER and allowing them to become so intimately involved in the security arrangements and barring practices of the premises, must "be described in all fairness as ...state actor(s)", Edmonson vs. Leesville Concrete co. 500U.S.__, 111 S. Ct. __, 114 L. Ed.2d 660, 673 (1991); Adickes vs. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed.2d 142 (1970), see Marsh vs. Alabama, 326 U.S. 501, 90 L. Ed. 265 (1946).

14. That each of the named Defendants is in violation or have been in violation of the Plaintiff's aforesaid Constitutional Rights afforded to him pursuant to the Constitution of the State of Illinois, in depriving him of his right of movement, association and due process.

15. That each of the named Defendants is or has been in violation of the Plaintiff's statutory rights pursuant to Section 21-3(c), Ch. 38, 1991 Ill. Rev. Stats. to be free of trespass arrest when he visits his invitors who are PARKSIDE AND MANSARD SQUARE tenants at their residences.

16. That each of the named Defendants is or has falsely imprisoned the Plaintiff in unlawfully restraining him against his will in exercising his personal liberty in visiting with his invitors at their residences.

17. That each of the named Defendants has unlawfully restrained the Plaintiff in prohibiting him from exercising his personal liberty to visit his invitors at their residences.

18, That irreparable injury shall result to the Plaintiff if he visits Lorraine Cowart, Rosie L. Ashe or anyone else who is a tenant of PARKSIDE AND MANSARD SQUARE APARTMENTS who invites him in that he will be arrested for trespass or will be at high risk of such an arrest.

19. That his remedies at law are inadequate.

WHEREFORE, the Plaintiff, LAWRENCE A. WILLIAMS, respectfully prays for Judgment against all Defendants:

A. That grants him a permanent injunction forbidding the Defendants from arresting him or having him arrested for trespass or from otherwise barring or preventing him access when he is lawfully on the premises of PARKSIDE AND MANSARD SQUARE APARTMENTS on invitation by Lorraine Cowart or any other tenant of the premises.

B. That awards him his costs of suit and such further relief the Court deems equitable and just.

C. That awards him his attorney fees pursuant to 42 U.S.C. 1988.

COUNT II, CLARK, INJUNCTION

For Count II of the Complaint, the Plaintiff, MANSION CLARK W. CLARK, states the following as to all Defendants:

1-6. That he repeats and realleges paragraphs 1, 2, 3, 4, 5 and 6 of Count I as his paragraphs 1, 2, 3, 4, 5, and 6 of this Count II.

7. That at all times mentioned in this Complaint, the Plaintiff, a resident of Champaign, Illinois, has and still his daughter, Sharon Clark, Wanda Brown, other relatives and close friends, all of whom are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS.

8. That notwithstanding the said invitations, PARKSIDE AND MANSARD SQUARE APARTMENTS, since July 12, 1989, has arbitrarily barred the Plaintiff from the premises without affording him a hearing, on pain of imminent arrest as per exhibit "F", attached hereto and incorporated herein, a "notice" not seen by him until given in discovery for a trespass arrest, a "Notice" that falsely accuses him of "unlawful use of weapons", a "Notice" that cannot be deemed in any way effective in that PARKSIDE AND MANSARD SQUARE APARTMENTS allowed him to actually reside in Sharon Clark's apartment for 2 or 3 months in the Winter-Spring of 1991, accepting his rental payments.

9. That notwithstanding the said permanent invitation, the Defendant, CITY OF CHAMPAIGN, POLICE DEPARTMENT, has arrested the Plaintiff for trespass on December 30, 1991 (91-CM-2652), an arrest that did not result in conviction.

10. That the Plaintiff desires to visit his daughter, Sharon Clark, Wanda Brown, other relatives and close friends at their residences at PARKSIDE AND MANSARD SQUARE APARTMENTS on their invitations but fears imminent arrest by the CHAMPAIGN POLICE DEPARTMENT if he does so.

11. (repeat and reallege from Count I)

12. That the Plaintiff is afforded one or more of the following legal rights to visit at any time with Sharon Clark, Wanda Brown, other relatives and close friends who are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS who invite him to their residences without pain of arrest:

12A-12F. (repeat and reallege from Count I)

13-17. (repeat and reallege from Count I)

18. That irreparable injury shall result to the Plaintiff if he visits Sharon Clark, Wanda Brown, other relatives or close friend or anyone else who is a tenant of PARKSIDE AND MANSARD SQUARE APARTMENTS who invites him in that he will be arrested for trespass or (be) at high risk (f)or such arrest.

19. That his remedies at law are inadequate.

WHEREFORE, the Plaintiff, MANSION W. CLARK, respectfully prays for Judgment against all Defendants;

A. That grants him a permanent injunction forbidding the Defendant from arresting him or having him arrested for trespass or from otherwise barring or preventing him access when he is lawfully on the premises of PARKSIDE AND MANSARD SQUARE APARTMENTS on invitation by Sharon Clark or any other tenant of the premises.

B. That awards him his costs of suit and such further relief the Court deems equitable and just.

c. That awards him attorney fees pursuant to 42 U.S.C. 1988.

COUNT III, MERRIWEATHER, INJUNCTION

For Count III of this Complaint, the Plaintiff, DONALD F. MERRIWEATHER, states the following as to all Defendants:

1-6. (repeat and reallege from Count I)

7. That at all times mentioned in this complaint, the Plaintiff, a resident of Champaign, Illinois had and still has invitations to visit with relatives and close friends who are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS who invite him to their residences.

8. That notwithstanding the said invitations, Officers Ron Durbin and John Schweihart, Jr., police officers employed by the CHAMPAIGN POLICE DEPARTMENT and acting on behalf of all Defendants herein decided to and actually did immediately bar the Plaintiff from the premises of PARKSIDE AND MANSARD SQUARE on July 29, 1992, telling him that "his kind" was not wanted on the

premises and served him a written Notice, attached hereto as exhibit "I" and incorporated herein, informing plaintiff that if he was seen on the premises, he would be arrested for trespassing, all without affording him a hearing.

9. That the Plaintiff is in fear of imminent arrest if he is on the premises of PARKSIDE AND MANSARD SQUARE APARTMENTS.

10. That the Plaintiff desires to visit his invitors who are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS but can only do so on pain of imminent arrest. 11. (repeat and reallege from Count I)

12. That the Plaintiff ids afforded one or more of the following legal rights to visit with relatives and close friends or anyone else who is a tenant of PARKSIDE AND MANSARD SQUARE APARTMENTS who invite him to their residences without pain of arrest. 12A-12F. (repeat and reallege from Count I) 13-17. (repeat and reallege from Count I) 18. That irreparable injury shall result to the Plaintiff if he visits his invitors who are tenants of PARKSIDE AND MANSARD SQUARE APARTMENTS at their residences in that he will be arrested for trespass or will be at high risk of such arrest.

19. That his remedies at law are inadequate.

WHEREFORE, the Plaintiff, DONALD F. MERRIWEATHER, prays for Judgment against all Defendants:

A. That grants him a permanent injunction forbidding the Defendants from arresting him or otherwise barring or preventing him access when he is lawfully on the premises of PARKSIDE AND MANSARD SQUARE APARTMENTS on invitation by his relatives and friend who are tenants of the premises.

B. That awards him his costs of suit and such further relief the Court deems equitable and just.

C. That awards him attorneys fees pursuant to 42 U.S.C. 1988

TCR 92-108

(Counts IV through VIII are class action and damage counts, R. 108-117, with the attached exhibits "A" through "I" appearing at R. 118-128)

X. MEYER V. VILLAGE OF CARPENTERSVILLE

1994 U.S. Dist. LEXIS 3257 printed in FULL format.

RANDOLPH S. MEYER and DIANE VALEK, DARNELL WILLIAMS, and CURTIS HARRIS and all other persons similarly situated, Plaintiffs, v. VILLAGE OF CARPENTERSVILLE, an Illinois corporation, KIMBALL HILL MANAGEMENT COMPANY, KIMBALL HILL, INC., an Illinois corporation, JOHN YOST, and JOHN TERRY Defendants.

MEYER v. VILLAGE OF CARPENTERSVILLE

No. 93 C 7429

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 3257

March 18, 1994, Decided

March 21, 1994, Docketed

JUDGES: [*1] NORDBERG

OPINION BY: JOHN A. NORDBERG

OPINION: MEMORANDUM OPINION AND ORDER

Defendants Kimball Hill, Inc. and Kimball Management Co. (collectively, the "Kimball Defendants") were the owners, managers and lessors of certain HUD subsidized residential apartment units called the Fox View Apartments located in the Village of Carpentersville in Kane County, Illinois. The Kimball Defendants maintained a list of individuals whom it sought to keep from entering the Fox View Apartments. Plaintiffs are a group of individuals named on the Kimball Defendants' list. They filed a four count Complaint in the Circuit Court for the Sixteenth Judicial Circuit in Kane County, alleging that the Kimball Defendants, the Village of Carpentersville, and two village police officers, John Yost and John Terry, violated their civil rights under 42 U.S.C. §§ 1983, 1986, 1988 (1988) and subjected them to false arrest. Before the Court are Plaintiffs' Motion to Voluntarily Dismiss Counts II and IV of their Complaint pursuant to Fed. R. Civ. P. 41(a), and the Kimbell Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b).

Plaintiffs allege that they were "harassed, subjected to arrest, [*2] arrested, subjected to the use of excessive force, taken into custody and incarcerated without probable cause" when they entered or nearly entered the Fox Apartment Property "merely" because they appeared on a list "jointly developed and maintained" by the Kimbell Defendants and members of the Village of Carpentersville Police. At

issue is whether these and the other allegations in the Complaint are sufficient to allege the state action required by section 1983.

Plaintiffs seek leave of Court to voluntarily dismiss Counts II and IV oftheir Complaint. Defendants have not filed objections to this motion. It isgranted.

1994 U.S. Dist. LEXIS 3257, *2 LEXSEE

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Barkman v. Wabash, Inc., 674 F. Supp. 623 (N.D. Ill. 1991). In order to survive a motion to dismiss, a complaint must allege sufficient facts to outline a cause of action. Davis v. Frapolly, 747 F. Supp. 451 (N.D. Ill. 1989). The Court must accept as true all facts alleged in the complaint and reasonable inferences based on those facts. Bane v. Ferguson, 890 F.2d 11, 13 (7th Cir. 1989). [*3] However, the Court need not accept as true conclusory legal allegations. Coronet Ins. Co. v. Seyfarth, 665 F. Supp. 661, 665 (N.D. Ill. 1987). A motion to dismiss may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

In the opinion of the Court, Count I of Plaintiffs' Complaint is sufficient to state a claim under section 1983. To state a claim under section 1983 against a defendant, a plaintiff must allege facts sufficient to show that the defendant acted "under color of law". Private defendants, like the Kimbell Defendants, act under color of law when they willfully participate in joint action with the State or its agents. See Leahy v. Board of Trustees of Community College Dist. NO. 508, 912 F.2d 917, 921 (7th Cir. 1990). Here, Plaintiffs contend that the Kimbell Defendants are state actors because they jointly developed and maintained a list of "undesirables" with the police. The conduct [*4] is said to be "wilful participation in joint action."

In the opinion of the Court, Plaintiffs have alleged facts sufficient to
withstand a motion to dismiss. Plaintiffs are not required to allege evidence. Based on the allegations in the Complaint, together with reasonable inferences therefrom, the Court cannot conclude that Plaintiffs can prove no set of facts to demonstrate that the Kimbell Defendants acted under of color of state law.

The Kimbell Defendants argue that, under Williams v. Nagel, 251 Ill. App. 3d 176, 620 N.E.2d 1376, 190 Ill. Dec. 115 (Ill. Ct. App. 1993), Plaintiffs' case must fail as a matter of law. In Williams, the Illinois Court of Appeals for the Fourth District granted a private apartment complex's motion for summary judgment on the "state action" issue in a case where the plaintiff claimed that the private actor was a "state actor" due to a close nexus between the private actor and city police in the barring of certain individuals from entering a housing complex managed by the private actor. The Williams court held that the private actor was not a state actor because the evidence submitted [*5] in support of the motion did not support the required "nexus" between state and private actors.

In the opinion of the Court, the Williams decision is insufficient authority upon which to grant Defendants' motion. At this stage in the litigation, unlike in Williams, the Plaintiffs have had no opportunity to demonstrate a relation between the Kimbell Defendants' conduct and that of the police. Without specifying any particular set of facts, the Court notes that Plaintiffs may be able to demonstrate, contrary to Williams, that the Kimbell Defendants were acting jointly with or on behalf of the police. They may also be able to show that the police decided what individuals were to be put on the "undesirable list." Of course, on a future motion for summary judgment, the Kimbell Defendants might then be able to prove that the facts are to the contrary and that Williams, and other authority, should govern the Court's decision. At this point, however, Conley v. Gibson requires that the Court permit Plaintiffs' claim to proceed. n1

----------Footnotes----------

n1 Defendants have made no argument regarding the substance of Plaintiffs' Count I claims. In particular, Defendants make no challenge to Plaintiffs' claimed rights violations. Those issues will have to be resolved at a later point in this litigation.

----------End Footnotes----------

[*6]

Similarly, with respect to Count III, the Court cannot conclude that there are no set of facts in support of Plaintiffs claim which would entitle them to relief for false arrest. When a private individual unlawfully causes or procures an arrest by a police officer, that private individual may be liable for false arrest. See Dutton v. Roo-

Mac, Inc., 100 Ill. App. 3d 116, 426 N.E.2d 604, 607, 55 Ill. Dec. 458 (Ill. App. Ct. 1981). Here, Plaintiffs allege that they were arrested attempting to enter the subject property because Defendants placed their names on a list of people to keep off the property. While, in the opinion of the Court, Plaintiffs' Complaint could have been drafted with more specificity, it contains allegations sufficient to withstand a motion to dismiss.

Accordingly, Plaintiffs' Motion for a voluntary dismissal of Counts II and IV is granted. Defendants' Motion to Dismiss is denied.

ENTER:

JOHN A. NORDBERG

United States District Judge

DATED: March 18, 1994

Supreme Court, U.S.
FILED
MAR 15 1995
OFFICE OF THE CLERK

No. 94-1390

In The

Supreme Court of the United States

October Term, 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER,

Petitioners,

v.

KARL NAGEL and STEVEN W. BARRICK doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality; DONALD HANNA; and DON CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR CITY OF CHAMPAIGN, DONALD HANNA AND DON CARTER RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether the arrest of a person for trespass who has been barred by management of a privately owned apartment complex, pursuant to agreements between management and tenants in the lease, and who has been served with a notice informing him that if he returns to the premises he will be arrested for trespass is constitutionally infirm because the arrested person claims to have been invited by a tenant.

Whether 42 U.S.C. § 1983 imposes liability on a city for the arrest of a person for trespass where that person has been barred from the premises of a privately owned apartment complex by management pursuant to lease terms and where: 1) management sometimes, but not always, relies upon police information and advice in making the decision to bar individuals; and, 2) the statutory notice is sometimes, but not always, served by police officers upon the barred person.

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No. 94-1390

In The

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October Term, 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER,

Petitioners,

v.

KARL NAGEL and STEVEN W. BARRICK doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality; DONALD HANNA; and DON CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR CITY OF CHAMPAIGN, DONALD HANNA AND DON CARTER RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Illinois Supreme Court is reported in *Williams, et al. v. Nagel, et al.*, 162 Ill.2d 562, 643 N.E.2d 816. The opinion of the Appellate Court of

Illinois for the Fourth Judicial District is reported in 251 Ill.App.3d 176, 620 N.E.2d 1376.

JURISDICTIONAL STATEMENT

Petitioners have invoked jurisdiction under 28 U.S.C. § 1257(a) and 28 U.S.C. § 2403(b) claiming that the interpretation of the Illinois Supreme Court of its trespass statute, Ill.Rev.Stat. Ch. 38, ¶ 21-3(c) (1991) calls that statute's constitutionality into question.

STATEMENT OF FACTS

(This statement of facts is taken from the decisions of the Illinois Supreme Court and Appellate Court or the pleadings contained in the Appendix to the Petition.)

Petitioners Williams and Clark were notified by the owners of Parkside and Mansard Square Apartments that they were barred from the premises and that they would be arrested for trespass if they entered the property. Williams and Clark allege that subsequently they were arrested for trespass but they were not convicted. (Pet.App. 45, 51.) Petitioner Merriweather pleads he received his notice from two Champaign police officers. (Pet.App. 52.) Merriweather, however, was convicted of trespass and also was barred from the premises in that proceeding by order of the circuit court. (Pet.App. 30.) All three Petitioners claim that despite these notices they had been invited to the premises by tenants and their arrests were therefore unlawful.

Parkside and Mansard Square Apartments are privately owned. Its tenants live on the premises under a lease and certain written "rules and regulations." The rules are provided for in the lease and the "Rules and Regulations" reserve to management the right to bar persons from the premises. (Pet.App. 4.) The Petitioners are not tenants. (Pet.App. 5.)

Donald Hanna, the former Chief of Police for the City of Champaign, in an affidavit submitted in support of a Motion for Summary Judgment, testified that there was no policy, custom or practice of the police department to bar persons from the Parkside/Mansard premises but that if persons were barred by the management of the apartments those persons were subject to arrest by the police for trespass. (Pet.App. 9, 29.) Don Carter, the then "Acting" (now) Chief of Police for Champaign, said that there is no policy of the Police Department to bar persons from those premises and that the police department did not make the decision to bar these Petitioners. Carter also said that police officials met with various groups including management of the apartments, tenants, concerned citizens and the State's Attorney, to discuss means and methods to bring a greater degree of safety and security to the residents. (Pet.App. 9, 29-30.)

At these meetings the trespass laws were discussed. It was emphasized at these meetings that property owners and not the police have the authority to bar persons from private property and that the police can arrest for trespass only if the property owner has barred them. Carter said that police officers have occasionally

served the barring notice upon individuals but the decision to bar is management's. Carter also said that sometimes police provide information and advice to management concerning individuals who have been observed on the premises. Sometimes this advice is followed by management and sometimes it is not. (Pet.App. 9, 30.)

Pat Jeffers, the Vice-President of the owner of the Apartments, testified in her affidavit that the management maintains a "no-trespass list" over which it has complete and total discretion. While police officers sometimes serve the written notice upon individuals, the decision to place those individuals on a "barred list" is solely that of management. (Pet.App. 8.)

EXPOSITION OF THE DECISION BELOW

This case was brought under 42 U.S.C § 1983 in counts for injunctive relief and damages against the owners of a privately owned apartment complex, the City of Champaign and its Police Chief and Assistant Police Chief. (Only the counts for injunctive relief are contained in the Appendix to the Petition.) The theory against the City was that it had a custom, policy or practice that was tantamount to controlling which persons would be placed on a "no trespass" list maintained by the management of the complex. (No issue of class based or invidious discrimination in determining who would be placed on this list is raised by the pleadings nor has it ever been argued

at any level.) The case was decided in favor of all Respondents in the trial court on Motions for Summary Judgment supported by affidavits. The Appellate Court for the Fourth Judicial District of Illinois affirmed. The Illinois Supreme Court granted leave to appeal and also affirmed in a 5-2 decision with a written dissent.

The Illinois Supreme Court held that these Petitioners were not excepted from the provisions of Illinois trespass law because the "invitations" that they claimed to have were invalid. (Pet.App. 12-13.) This holding follows from the lease provisions under which the tenants agreed that management could bar persons from the premises. Since the Petitioners had been barred by management, served with notice and placed up a "no trespass" list, the tenants' subsequent invitation was invalid. Since they were not "invited" Petitioners were not excepted from the trespass statute. (Pet.App. 12-13.)

The Illinois Supreme Court also held, citing *Blum v. Yaretsky*, 457 U.S. 991, 73 L.Ed.2d 534, 102 S.Ct. 277 (1982), that there was not a sufficiently close nexus between the police officers' conduct and the property owners' actions to justify holding the City responsible for the owners' acts in barring of individuals from its premises. (Pet.App. 11.) The uncontroverted evidence upon which this holding is based establishes that management had complete discretion to determine who would be placed upon its "no trespass" list. (Pet.App. 10.) Management would sometimes receive advice or information from police officers about individuals but management would not always follow that advice. Sometimes, on behalf of management, police officers would serve written notice to individuals informing them that they were barred. The

Illinois Supreme Court indicated its view that this was sometimes "borne out of necessity" because "police were often present to disperse unruly groups and intervene in altercations as they arose in the complex." (Pet.App. 9.) (Neither Williams nor Clark were served by police officers. (Pet.App. 5, 51.)) The court found that Petitioners had failed to raise any question of material fact in this regard. Because there was no evidence that the Champaign Police Department placed individual names on the list or exercised coercive power over the owners to decide which individuals should be on the list, the owners' acts of barring individuals was held to be purely private action for which the City should not be held responsible. (Pet.App. 11.)

The dissenting justices had two points of disagreement with the majority. First, they felt that even if the invitations were invalid the proper remedy for the landlord was to take civil action for breach of lease against the tenant rather than criminal action against the invited person. (Pet.App. 14-15.) In the dissenters' view, the fact of the invitation, valid or not, made the arrests unlawful. (Pet.App. 15.) Secondly, the dissent felt that enforcement of the trespass law to aid management in controlling its premises was an abuse of the criminal law. Thus, because the arrests were unlawful and the enforcement scheme an abuse, the dissent felt there was sufficient basis to hold the City liable. (Pet.App. 16.)

ARGUMENT

The decision by the majority Illinois Supreme Court was correct. The first premise of the Petitioners, and of the dissenting opinion, that the arrests were unlawful and without probable cause is wrong. Probable cause was established in Petitioners' pleadings. Whether Petitioners were excepted from the trespass law because they had invitations turns upon construction of Illinois law regarding exceptions to Illinois' general law of trespass. It is not an issue that should be reversed by this Court. The second issue, whether there was a sufficiently close nexus between the actions of the owners and the police to impose liability upon the City for actions of the owners in barring the individuals was also correctly determined. Moreover, the issue is fact bound and is not in conflict with federal decisions in any event.

1. Petitioners claim a right of entry to the premises of a privately owned apartment complex because they were allegedly invited by tenants even though they had been barred from the premises by the management of the complex. They claim this right under subsection (c) of § 21-3 of the Criminal Code of the State of Illinois. Ill.Rev.Stat. Ch. 38, ¶ 21-3(c) (1991), now found in 720 ILCS 5/21-3(c). Under § 21-3 a person who has been given notice by the owner that entry to the premises is forbidden is guilty of a misdemeanor if he subsequently enters the premises. However, subsection (c) provides that this section is not applicable to one who is invited to the premises by a tenant. Petitioners have pleaded that they were given such statutory notice and were subsequently arrested when they re-entered the premises. They claim that their arrests were unlawful because they were

invited. Because of the invitation the dissenting justices in Illinois felt there was no probable cause for the arrests.

There are two issues in this analysis. First, were Petitioners "invited" so as to be excepted from the provisions of the trespass statute; and second, was there probable cause for the arrests? On the first question, the Illinois Supreme Court held that under Illinois law the "invitations" were invalid because tenants had no authority to invite these persons to the premises. The lease provided that management had the right to bar persons and, therefore, held the Court, any attempt to invite persons who had already been barred by management was invalid. One who has an invalid invitation is not an invitee within the meaning of § 21-3(c).

This determination is a construction of Illinois law and raises no Constitutional issue. The leases are between a private owner and private citizens. Petitioners are not parties to the leases and their standing to attack them is doubtful. Petitioners do not argue that because of their status as "invitees" they have any constitutional rights to enter this property. Petitioners do not attack the constitutionality of the Illinois trespass statute. Rather, Petitioners claim a "right" to be excepted from the trespass statute through the terms of subsection 21-3(c). As a matter of state law and on the facts presented, the Supreme Court of Illinois has held that exception does not apply.

As to the probable cause issue both Petitioners and the dissenting justices are wrong. Petitioners have pleaded facts that give rise to probable cause. They received notice that entry was forbidden and they reentered the premises prior to arrest. Even if the invitation

was valid – a position *not* taken by the dissenting justices – that invitation would not negate probable cause. The fact of invitation, like a defense to any other criminal charge, is something outside the elements of the offense charged which might be raised in defense. It does not make the arrest unlawful.

In this case, the majority held that Petitioners were not entitled to that defense because they were not "invitees" under the statute. Because they were not invitees excepted from the statute, their arrests based upon prior notice and subsequent re-entry – facts established on the record – were lawful. This question turns upon construction of Illinois law and does not raise constitutional issues.

2. The Illinois Supreme Court also correctly determined that there was an insufficient nexus between the conduct of the police and the actions of the apartment owners to impose liability upon the City. Petitioners alleged that the City had a custom, policy or practice that was tantamount to controlling who was placed on the "no trespass" list. Petitioners, however, had no evidence to support that claim. The evidence from both the City and management established that management had complete control over the list and had sole discretion and authority to place names upon it. The record establishes that the Police Department received no policy directive from the City to bar persons. (Pet.App. 29.) Only management and not police officers could make such decisions. The record indicates that the management would sometimes receive information or advice from police officers but that advice was not always followed. Police officers sometimes served the required notice but did not serve either Clark

or Williams. Whether the police or someone else served the notice, the decision to place a person on the "no trespass" list was management's. There was no evidence remotely suggesting that the police used coercive power over management to bar any individuals. See *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L.Ed.2d 534, 546, 102 S.Ct. 2777, 2786 (1982).

Whether involvement by the police in private actions is sufficient to make the City liable for the private action is, necessarily, a case-by-case factual inquiry. Here, the involvement by police was limited to providing occasional information and advice. That advice was followed sometimes and sometimes it was not. Respondents are unaware of any case which forbids that kind of activity by police officers. Nor are Respondents aware of any case forbidding a private landowner who, without unlawful, discriminatory intent, bars persons from its premises and relies upon police officers to enforce the criminal trespass law.

Contrary to the dissenting justices' view that trespass law should not be used to aid management's attempts to control its premises, trespass laws are designed to accomplish that very result. The statute recognizes a landowner's right to protect his property interests. *People v. Yutt*, 231 Ill.App.3d 718, 597 N.E.2d 208, 214 (3d Dist., 1992). This right of an owner to control property and to control visitors upon it has been recognized in a number of different cases. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (shopping centers); *Illinois Migrant Council v. Campbell Soup Company*, 574 F.2d 374 (7th Cir., 1978) (migrant labor camps); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238

(1st Cir., 1981) (nursing homes); *State of Wisconsin v. Horn*, 126 Wis.2d 447, 377 N.W.2d 176 (1985) (medical clinic) are examples where access was denied even over claimed constitutional rights. The Illinois Supreme Court has held a landowner's right, obtained by agreement with its tenants, to exclude persons from his property and to rely upon the enforcement of criminal trespass law. This decision is not in conflict with federal law.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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No. 94–1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER

Plaintiffs-Petitioners,

vs.

KARL NAGEL and STEVEN BARRICK, d/b/a CHAMPAIGN HOUSING ASSOCIATES, a partnership d/b/a PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., and THE CITY OF CHAMPAIGN, DONALD HANNA, and DON CARTER,

Defendants-Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF OF NAGEL GROUP IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

The Nagel Group Respondents own and operate an apartment complex. Petitioners desire to visit friends and relatives who are tenants in that complex and who have invited such visits. However, as permitted by the tenants' leases, the Nagel Group has barred Petitioners from the premises, regardless of any tenant invitations they might have. Petitioners assert both a substantive due process right to visit their friends and relatives on the Nagel Group's property, despite otherwise valid "no trespassing" orders, and a procedural due process right to notice and a hearing before being barred.

> On these facts and where undisputed evidence showed that all decisions to forbid trespassing on the property were solely those of the Nagel Group, did the Illinois Supreme Court err in finding that the private decisions were not converted to state action by the Nagel Group's consideration of information and recommendations from the police, by use of police to serve formal notices that trespassing was forbidden, and by arrest of Petitioners when they trespassed despite such warnings?

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STATEMENT OF FACTS[1]

Nature of the Case

Respondents Karl Nagel, Steven W. Barrick, Champaign Housing Associates, Steven W. Barrick and Associates, and the Nagel Group Inc. (collectively, "Nagel Group")[2] own and operate Parkside and Mansard Square Apartments ("Parkside")[3] in Champaign, Illinois. (Pet. App. 44) Petitioners Lawrence A. Williams, Mansion W. Clark, and Donald F. Merriweather have friends and relatives who are tenants at Parkside, and those tenants have invited Petitioners to visit them in their respective apartments. (Pet. 1) However, the tenants' leases and the rules adopted by the Nagel Group authorize the Nagel Group, in its sole discretion, to bar non-tenant individuals from the property regardless of whether they have tenant invitations to visit. (Pet. 10; C45-46, 50) The Nagel Group has placed Petitioners on its "no trespass" list, and Petitioners have been served notices forbidding them to be on Parkside premises. (Pet. 1-3) Petitioners Williams and Clark have been arrested for criminal trespass

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1 This case was decided on summary judgment. Accordingly, the factual record must be viewed in the light most favorable to Petitioners, against whom the judgment was rendered. However, where evidence or factual materials were submitted by Respondents, unsupported allegations may be disregarded.

2 The Nagel Group, Inc. has no corporate parents or subsidiaries, other than wholly owned subsidiaries.

3 Parkside participates in federal rent subsidy programs and, in connection therewith, complies with a variety of federal regulations. (Pet. App. 44) Petitioners make no claim that the Nagel Group has violated any such regulations, that any federal agency or official has acted improperly, or that any federal agency or official is implicated in or responsible for any of the activities complained of.

on charges that they entered Parkside premises despite such notices;[4] Petitioner Merriweather was convicted of criminal trespass at Parkside and barred from the premises as a condition of probation. (Pet. 1-3; C158-59) All now fear to enter those premises lest they again be arrested. (Pet. 1-3)

Petitioners desire to visit their friends and relatives at Parkside,[5] and brought this action to enjoin the Nagel Group from excluding them from Parkside or seeking to have them arrested should they enter. (Pet. App. 43-53) They also seek to enjoin Respondents City of Champaign, Donald Hanna (its Chief of Police), and Don Carter (its Deputy Chief of Police) (collectively, "City Respondents") from arresting them for trespass at Parkside when on the premises at tenant invitation.[6] (Pet. App. 43-53) None of the tenants whom Petitioners seek to visit joined in this action.

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4 It is alleged that some of these arrests resulted in no prosecution and none have yet resulted in convictions. (Pet. App. 45, 51) The record does not indicate whether there were or are any pending prosecutions which have not yet been resolved or whether prosecutions might yet be brought based on prior arrests. *The issue here is not whether Petitioners can be convicted for any past conduct, but whether they are entitled to an injunction against future interference with visitation at Parkside.*

5 Regardless of the "no trespass" orders, Petitioners are free to visit with their friends and relatives at any place other than Parkside, so they are not prevented from maintaining relationships and associations, intimate or otherwise, with those individuals.

6 Petitioners previously maintained that, under Illinois law, such invitations rendered their presence lawful. (Pet. App. 47, 51, 53) The Illinois Supreme Court ruled otherwise. 162 Ill. 2d 542, 554-56, 643 N.E.2d 816, 821-22 (Pet. App. 11-13).

The Circuit Court of the Sixth Judicial Circuit, Champaign County, after holding a preliminary injunction hearing and receiving additional affidavits, found insufficient evidence of state action by the Nagel Group in excluding Petitioners from the Parkside premises and rendered summary judgment against Petitioners. The Illinois Appellate Court and Supreme Court affirmed.

The Legal Context

In Illinois, as elsewhere, one commits a civil trespass by going or remaining on the property of another without the express or implied consent of the owner or occupant. *People v. Goduto*, 21 Ill. 2d 605, 609, 174 N.E.2d 385, 387 (1961); Restatement (Second) of Torts § 158 (1965). Criminal trespass has an additional requirement: the trespasser must have received prior notice from the owner or occupant forbidding entry or requiring departure. 720 Ill. Comp. Stat. 5/21-3(a) (1994). Moreover, the criminal statute does not apply to anyone legitimately living on the property or anyone invited by such a person. *Id.* 5/21-3(c). But, as the Illinois Supreme Court has construed the statute, the latter exception is not available where the invitation is invalid because the invitee has been barred by the owner and the resident has agreed that those so barred may not be invited. 162 Ill. 2d 542, 554-56, 643 N.E.2d 816, 822 (Pet. App. 11-13); Ill. App. 3d 176, 180-82, 620 N.E.2d 1376, 1379-80 (Pet. App. 22-25).

It is undisputed that Parkside tenants sign leases which require them to obey reasonable rules after being given 30 days notice. (C 45-46, 50) It is also undisputed that one such rule provides that "Management has the right to bar individuals from the property." (Pet. 10) The Illinois Supreme Court held these provisions sufficient to render invalid invitations of those barred by the Nagel Group. 162 Ill.2d at 555-56, 643 N.E.2d at 822 (Pet. App. 12-13).

The Exclusion Process

Apart from possible unplanned reactions to disturbances, before anyone can be subject to exclusion from Parkside premises, the Nagel Group must place that person on its "no trespass" list. (Pet. 5) To be subject to arrest for criminal trespass, that person must also be served with a barred notice to assure satisfaction of the statutory requirements. (Pet. 4) Barred notices are commonly served before a final decision is made whether to place a person on the "no trespass" list. (Pet. 4-5) But the Illinois Supreme Court found it undisputed that "a barred notice alone would not subject an individual to arrest. . . . [T]he only individuals subject to arrest for criminal trespass were those placed on the "no trespass" list. 162 Ill.2d at 552, 643 N.E.2d at 820 (Pet. App. 10).

It was also undisputed that

> the management of Parkside Apartments made all decisions concerning the "no trespass" list of its own accord. The affidavit submitted by property manager Patricia Jeffers of the Nagel Group unequivocally states that the management of Parkside apartments reserves "complete and total discretion" as to whether or not to place an individual on the "no trespass" list. Jeffers' affidavit is corroborated by the affidavit of Mark Hamilton of Yale Security Services, who also clarified that a distinction exists between being served a barred notice and actually being placed on the "no trespass" list. Hamilton stated that no one was able to place an individual on the "no trespass" list except the employees of Parkside Apartments.

Id.

The Petition does not challenge either point. Rather, it notes that the police often provided information or recommendations which were the basis for decisions to place people on the "no trespass" list. (Pet. 6-9, 13-18) But the Illinois Supreme Court considered this point and found it undisputed that, "[w]hile the Nagel Group may have heard recommendations from the Champaign police department as to who should be placed on the 'no trespass' list, such recommendations were purely advisory." *Id.* Such recommendations were sometimes rejected, and "the decision as to which individuals should be placed on the "no trespass" list rested in the sole discretion of the private property owners." *Id.* at 550, 553, 643 N.E.2d at 820, 824 (Pet. App. 8, 10).

The Petition also points to the fact that police, as well as management and its private security force, were authorized by the Nagel Group to serve barred notices. (Pet. 4, 9, 13, 16) But it was undisputed that "[t]he receipt of a barred notice does not, in and of itself, subject an individual to arrest." *Id.* at 553, 643 N.E.2d at 821 (Pet. App. 10). Rather, "the pivotal inquiry here focuses upon the placement of an individual's name on the 'no trespass' list because [such placement] would subject an individual to arrest for criminal trespass," while "mere service of a barred notice" would not.[7] *Id.*

Finally, the Petition complains that the Nagel Group perceives itself as having some interests--controlling crime and

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[7] Petitioners assert that one receiving a barred notice is not informed whether he or she has been placed on the "no trespass" list. (Pet. 5, 22) But a recipient of such a notice who has or receives an invitation from a tenant can have the tenant check on whether the invitee is on the "no trespass" list and, if so, request removal. Such requests are regularly considered and sometimes granted. (Pet. 1-2, 6-7)

protecting Parkside residents--in common with the police and makes decisions on the "no trespass" list in furtherance of those interests. (Pet. 4-9) Not surprisingly, the City Respondents also perceive those common interests and solicit landlords sharing that perception to act accordingly. (Pet. 7, 9-10)

REASONS FOR DENYING THE WRIT

I. THE FINDING THAT THE RECORD HERE SHOWS NO STATE ACTION IS NOT ONLY CORRECT AND UNCONTROVERSIAL, BUT IS ALSO SO FACT BOUND AS TO BE UNSUITED FOR THIS COURT'S REVIEW.

As this Court explained in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991):

> That an act violates the Constitution when committed by a government official, however, does not answer the question whether the same act offends constitutional guarantees if committed by a private litigant or his attorney. The Constitution's protections of individual liberty and equal protection apply in general only to action by the government.

The Court went on to explain the basis for this rule:

> The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States. With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. This

> fundamental limitation on the scope of constitutional guarantees "preserves an area of individual freedom by limiting the reach of federal law" and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

Id.

Moreover, a "major consequence" of this limitation "is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982).

Action by a private party authorized or permitted by state law, "without something more, [is] not sufficient to justify characterization of a private party as a 'state actor.'" *Id.* at 939. The "'something more' which would convert the private party into a state actor might vary with the circumstances on the case" because "this Court has articulated a number of different factors or tests in different contexts." *Id.*

However, many of those tests can be set aside in light of the claim presented here. Petitioners do not assert that the conduct complained of here involves any public function which "has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) (emphasis by *Rendell-Baker*). *Compare Edmondson v. Leesville Concrete Co., supra* (selection of jurors to exercise state judicial power);

Terry v. Adams, 345 U.S. 461 (1953) (election of public officials). Nor does it involve imposition on the state of the task of interpreting and implementing a scheme of discrimination which the state itself could not adopt. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenant, requiring state courts to implement and apply racial criteria to determine who could purchase property).

What is involved here is exclusion by the Nagel Group of particular individuals, selected by it, from its property. That property is private. Only when private property "has taken on all the attributes of a town," *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting), construing *Marsh v. Alabama*, 326 U.S. 501 (1946), can such property be treated as public. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976); *id.* at 523-24 (concurring op.). Petitioners have made no such showing. Indeed, Petitioners have not even shown that the Nagel Group has opened up Parkside for the use of the general public. Absent such a showing, mere use of state trespass law to enforce a private landowner's decision to exclude particular individuals does not convert the decision to exclude into state action. *Id.* at 518-21; *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567, 570 (1972).

The focus of this case is Petitioners' desire to come upon the premises at Parkside, despite the decision of the Nagel Group to exclude them. They complain about threatened arrest, but they have nothing to fear from the actions of the Nagel Group unless they attempt to trespass on its property. And, as just noted, enforcement of the trespass laws does not subject the decision to exclude to constitutional scrutiny. Moreover, the threatened arrests are challenged only insofar as they obstruct Petitioners' access to Parkside.

Because "constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), the issue is whether "'there is a sufficiently close nexus between the state and the challenged action [here, placement on the "no trespass" list] so that the action of [the Nagel Group] may fairly be treated as that of the State itself.'" *Id.* quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). The state can be held responsible for the Nagel Group's decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

Paraphrasing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), Petitioners ask (Pet. 13) this court to decide whether:

> "[t]he state has so far insinuated itself into a position of interdependence with [Parkside] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered so purely private as to fall without the scope of the Fourteenth Amendment."

As Petitioners themselves recognize (Pet. 12), this is "necessarily a fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). The Illinois Supreme Court correctly articulated the standard, 162 Ill 2d at 549, 643 N.E. 2d at 819 (Pet. App. 7), and engaged in the necessary "sifting" and "weighing." *Id.* at 549-53, 643 N.E.2d at 819-21 (Pet. App. 7-11).

The Illinois Supreme Court recognized that, as Petitioners assert, there was *some* police suggestion or encouragement of the decision to exclude Petitioners, but found those suggestions "purely advisory," so that the ultimate decisions were solely those of the Nagel Group. *Id.* at 552-53, 643 N.E.2d at 820. (Pet. App. 9-10) Petitioners fail to recognize that mere "encouragement" is not sufficient to convert private decisions to state action. Rather, that encouragement must be so "significant . . . that the decision must in law be deemed to be that of the state." *Blum*, 457 U.S. at 1004. Surely review by this Court is not necessary to reiterate that well-settled point.

It appears that what Petitioners really seek is a resifting and reweighing by this Court of the "facts and circumstances" considered by the Illinois Supreme Court. But, at least for the present, there is no reason to believe that such review would have any significance beyond this case. Apparently, no other case has yet reached the merits of a challenge to anything remotely similar, so there can be no conflict among lower courts. Petitioners make no showing that the practices at issue here are widespread. And even if such practices may become more common, they are likely to exhibit significant factual variations. Only after other courts have examined such variations and assessed their significance will it be known whether any guidance from this Court is necessary and, if so, on what issues.

While the Nagel Group believes the Illinois Supreme Court's decision to be clearly correct, it submits that it is even more obvious that there are no "special and important reasons" for review by this Court. Rule 10.1.

II. PETITIONERS' ATTEMPTED CHALLENGE TO THE VALIDITY OF THE CRIMINAL TRESPASS STATUTE IS NEITHER PROPERLY PRESENTED NOR EVEN ARGUABLY MERITORIOUS.

Petitioners seek to assert that the Illinois criminal trespass statute is unconstitutional, because "the invitee exception to trespass is unavailable to guests of tenants under rules reserving landlord barment authority." (Pet. 20) But no such argument was presented to the Illinois courts until the petition for rehearing in the Illinois Supreme Court. Illinois courts ordinarily do not consider issues raised for the first time on rehearing, *Schlenz v. Castle*, 115 Ill. 2d 135, 145, 503 N.E.2d 241, 245 (1986), *aff'g* 132 Ill. App. 3d 993, 1018, 477 N.E.2d 697, 716 (1985), and there is no indication that the Illinois Supreme Court did so here. Accordingly, the issue was not properly presented below and preserved for review by this Court. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (requirement that issue be presented to state court); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945) (first presentation in rehearing petition insufficient unless court actually considers and decides issue).

Petitioners seek to avoid this problem by asserting that the issue arose for the first time as a result of the Illinois Supreme Court's decision. (Pet. 10) However, the Appellate Court's construction of the statute, though slightly different, had the same effect as that of the Illinois Supreme Court: the tenant invitations relied upon by Petitioners give them no right to enter Parkside. And, to the extent that Petitioners seek to rely on supposed vagueness of the statute, their point is misdirected. Petitioners are not forced to guess at the meaning of the statute, at the risk of *criminal* penalties. Rather, the Illinois Supreme Court has authoritatively construed the statute and, based on that construction, found that *plaintiffs have no right to an injunction protecting their future conduct.* If Petitioners are ever prosecuted for past conduct, they are still free to argue that the statutory

text gave inadequate notice that such conduct was proscribed or that they had inadequate warning that their invitations were invalid.

Surely, Petitioners cannot *now* claim ignorance of the lease terms and rules at Parkside which, the Illinois Supreme Court has held, permit them to be barred from the premises. Thus, there is no basis to enjoin either their exclusion from Parkside or their arrest should they choose to trespass.

Application of the trespass statute to others (who may claim ignorance of the situation at Parkside) or to Petitioners at other locations is not at issue in this case. There will be time enough to address it should there be a prosecution in which a defendant is denied the opportunity to raise such ignorance as a defense or is convicted despite showing such ignorance.

CONCLUSION

For all of the reasons stated above, certiorari should be denied.

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(4)

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER,

Petitioners,

v.

KARL NAGEL and STEVEN W. BARRICK, doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC. an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality, DONALD HANNA , and DON CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. STANDING ARGUMENTS PRESENTED HAVE NO MERIT.

At page 11 of the Respondent Nagel Group's brief, the assertion appears that Petitioners' should have divined the sua sponte, surprise holding of the Supreme Court of Illinois that criminal trespass exemption per § 21-3(c), 720 ILCS is unavailable to guests of tenants under rules reserving landlord barment authority while still in the Appellate Court for the Fourth District, which held that § 21-3(c) was strictly limited to the guests of migrant workers only; that Petitioners then and there were obligated to advance the constitutional arguments stated in their Petition for Rehearing to the Supreme Court of Illinois, asserting, "...the Appellate Court's construction of the statute, *although slightly different,* had the same effect as that of the Illinois Supreme Court: the tenant invitations give them no right to enter Parkside." Id (emphasis added). This is a major misleading argument. The holding was *totally* different with no room nor necessity for the constitutional arguments brought to the attention of the Supreme Court of Illinois in the denied Petition for Rehearing. The Fourth District, not *adding* language, held: "Section 21-3(c) of the Criminal Code was intended by the legislature to address the plight of migrant workers or persons similarly situated; that subsection has nothing to do with the circumstances of this case and constitutes no defense to the charge of criminal trespass to land except in the limited circumstances involving migrant workers." Pet. App. 25. At this point, constitutional argument based on Lanzetta v New Jersey, 306 U.S. 451. 56 S. Ct. 618, 83 L. Ed. 888 (1939) would have been frivolous. Then, the guest exemption provision was "narrow and precise", Bouie v. Columbia, 378 U.S. 347, 352. 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) in stating sanction from trespass arrest on invitation of tenants, not at all constitutionally vague, with the Fourth District's strained and singular interpretation contradicting established

case law then cited, Karow v. Student Inns, Inc., 43 Ill. App. 3d 878, 357 N.E.. 2d 682, 1 Ill. Dec. 515 (4th Dist., 1976), People v. Flanagan, 133 Ill. App. 3d 1, 478 N.E. 2d 666, 88 Ill. Dec. 351 (4th Dist., 1985), City of Quincy v. Daniels, 615 N.E. 2d 839, 186 Ill. Dec. 35 (4th Dist., 1993), People v. Rynberk, 92 Ill. App. 3d 112, 415 N.E. 2d 1087, 47 Ill. Dec. 774 1st Dist., 1980), People v. Evans, 163 Ill. App. 3d 561, 516 N.E. 2d 817, 114 Ill. Dec. 662 (1st Dist., 1987) and at odds with ordinary principles of statutory construction, such as "plain and ordinary meaning", People ex Rel Ryan v. Villa Park, 212 Ill. App. 3d 187, 570 N.E. 2d 882, 156 Ill. Dec. 406, 409 (2d Dist., 1991) or reading a statute as a whole so that meaning is given each word, clause or sentence, leaving nothing superfluous. Morris v. Broadview, 385 Ill. 228, 52 N.E. 2d 769 (1944). (Id.). It is disingenuous to assert that constitutional, due process vagueness claims could then have been fashioned and to suggest that "Illinois courts ordinarily do not consider issues raised for the first time on rehearing... and there is no indication that the Illinois Supreme Court did so here...", Respondent Nagel Group's brief, 11 (citation omitted), when the arguments in the denied Petition for Rehearing were triggered *solely* on the basis of the Illinois Supreme Court's surprise ruling that had no precedent, was not mentioned by any courts below it and was not briefed by any of the parties at any stage of the case. The *only* points in this litigation where the constitutional arguments as to the criminal trespass exemption provision could be raised would be in the denied Petition for Rehearing and in this Petition, after the Supreme Court of Illinois had *added* constitutionally defective elements to 21-3(c). Cf. Hathorn v. Lovorn, 457 U.S. 255, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1982), Banker's life & Casualty Co.. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988). The citations of Respondent Nagel Group to this Court of Cardianale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969) and Radio Station WOW v. Johnson, 326 U.S. 120, 89 L. Ed. 2d 2092 (1945) serve only to mislead: In Cardinale, "the sole federal question argued...had *never* been raised, preserved, or passed upon by in the state courts below." 394 U.S. at 438 (emphasis

added); in Radio Station WOW, the petitioners had raised a jurisdictional issue for the first time in a petition for rehearing, denied by the Nebraska Supreme Court because the petitioners there had *previously* pleaded that issue in the trial court directly contrary to the position they took in their petition for rehearing, a scenario totally different from this case where the federal questions arose solely as a result of an unforeseen ruling Supreme Court of Illinois. Further, the burdensome citations to the irrelevant, tax protest litigation of Schlenz v. Castle, 115 Ill. 2d 135, 503 N.E. 2d 241, 104 Ill. Dec. 684 (1986) ("This action represents the latest salvo in a war which plaintiffs' counsel, Paul Hamer, has waged against revenue officials in this State over more than two decades." 115 Ill. 2d at 138 (citations omitted)) and at 132 Ill. App. 993, 477 N.E. 2d 697, 81 Ill. Dec. 571 (2d Dist., 1985) is inappropriate, having nothing to do with a petition for rehearing directed at an appellate court's surprise ruling adding constitutionally defective language to an otherwise sound criminal statute. The case concerned, inter alia, simple Hornbook law of "(p)arties cannot for the first time on petition for rehearing raise questions which were not urged or argued on appeal." 132 Ill. App. 3d at 1018. More red herrings are being tossed into this litigation.

II. RESPONDENTS ASSERT MISLEADING MATTERS SERVING ONLY TO DISTRACT.

Petitioners respectfully submit that overall, Respondents have not adequately stated good reason for denying the Petition. Misleading statements as "(w)hat is involved here is exclusion by the Nagel Group of particular individuals, *selected by it*, from its property...", Nagel Group Brief at page 8 (emphasis added) or generalities as "(h)ere, the involvement by the police was limited to providing occasional information and advice...sometimes followed... sometimes not...", Brief for City at page 10, do not cut into the concrete record presented in the Petition, especially portions of taped conversations, neither addressed in two previous opinions nor in either of the briefs in opposition,

that yield inescapable conclusion that the City of Champaign Police Department is doing the selecting with the landlord routinely, without thought, placing police selections on the "no-trespass list", joint state action. Other misleading inaccuracies are present, such as innuendo designed to convey the false impression that this case is about "possible unplanned reactions to disturbances", Nagel Group Brief at page 4, City Brief at page 6 (neither brief making any "appropriate references...to the record...", Rule 24.1(g)). Some assertions are false in suggesting that they are part of the record, as in note 7, Nagel Group brief at page 5: "Petitioner assert that one receiving a barred notice is not informed whether he or she has been placed on the "no trespass" list...But a recipient of such a notice who has or receives an invitation from a tenant can have a tenant check on whether the invitee is on the "no trespass" list and, if so, request removal. *Such requests are regularly considered and sometimes granted.*" The underlined, distractive suggestion is inappropriate in a due process, vagueness challenge to a criminal statute or its interpretation; at most, it suggests impermissable language (shifting the burden of notice to a defendant) in addition to that provided by the Supreme Court of Illinois, so that § 21-3(c) would now read: "This Section does not apply...to anyone invited by...(a tenant)...to visit him at the place he is...living... *except where a landlord reserves a provision in the lease the right to bar any person from the property and give notice specified in subsection(a), with the recipient of such a notice being under a duty of inquiry of his invitor whether he is on a "no trespass" list*". The italicized portion, that "*(s)uch requests are regularly considered and sometimes granted...*", is a statement of fact not at all appearing of record.

At page 8 of Respondent Nagel Group's brief, the shopping center case of Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972) is cited for the proposition that "...mere use of a state trespass law to enforce a private landowner's decision to exclude particular individuals does not convert the decision to exclude into state action." The case is distinguishable: In Tanner, "(t)he

handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used." 407 U.S. at 564. In this case, the purpose of Parkside and Mansard Square Apartments is to provide homes where people live and have guests in the traditional setting for exercise of First Amendment freeedom of association rights; secondly, had there been an agreement between mall management in Tanner and the local police department, whereby police would select certain groups as undesirable and recommend them to mall management for exclusion, as opposed to a blanket rule prohibiting handbilling, state action would be the appropriate ruling, as it should be in this case.

CONCLUSION

This Court previously has offered critical examination of "sweeping dragnet laws", City of Houston vs. Hill, 482 U.S. 451, 465, 197 S. Ct. 2502, 96 L. Ed. 2d 398, (1987) as is presented by this record. Petitioners submit Respondents state no sound reason for not doing so here and respectfully request issuance of a Writ of Certiorari to the Supreme Court of Illinois.

Respectfully Submitted,

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